No. 87-1293

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

JEETENDRA BHANDARI,
Petitioner,

v.

FIRST NATIONAL BANK OF COMMERCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Section 1981, 42 U.S.C., guarantees to "all persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." As such, this Court has held both that § 1981 prohibits discrimination against aliens based on citizenship status, and that § 1981 prohibits discrimination in the making of private contracts.

Does 42 U.S.C. § 1981, which bars alienage discrimination and which bars discrimination in the making of private contracts, prohibit alienage discrimination in the making of private contracts?

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FIRST NATIONAL BANK OF COMMERCE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Jeetendra Bhandari respectfully prays that a Writ of Certiorari issue to review the decision of the en banc United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 5, 1987.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fifth Circuit sitting en banc is reported at 829 F.2d 1343 (5th Cir. 1987), and is set out at 1a-25a of the Appendix. The Fifth Circuit panel opinion is reported at 808 F.2d 1082 (5th Cir. 1987), and is set out at 26a-78a of the Appendix. The judgment of the District Court of June 28, 1985, which is not reported, is set out at 79a of the Appendix. The District Court's opinion of June 27, 1985, which is not reported, is set out at 80a-93a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals sitting en banc was entered on October 5, 1987. Petitioner sought and was granted an extension of time by Justice White to and including February 2, 1988 to file this Petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTES INVOLVED

42 U.S.C. § 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 is derived both from § 1 of the Civil Rights Act of 1866, and from § 16 of the Voting Right-Act of 1870.

Section 1 of the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous con-

> dition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary not withstanding.

Section 16 of the Voting Rights Act of 1870, Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144, provided:

> *And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary not withstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

STATEMENT OF THE CASE

Petitioner Jeetendra Bhandari is an accountant, a native of India, and, at all times pertinent, has been a lawful permanent resident alien of the United States.

In October, 1983 petitioner applied for a Visa Card with the First National Bank of Commerce. The Bank at that time extended credit to over 400,000 bankcard customers, and processed approximately 10,000 credit card applications each month.

The Bank's credit policy expressly stated, "Applicant must be a U.S. Citizen unless the application is approved by an officer of the bank". App. at 82a. The application included the question, "Are you a U.S. Citizen?" App. at 27a. Petitioner answered, "No." App. at 27a. On November 16, 1983, petitioner received written notice that his application had been denied for the stated reason that he was "Not a U.S. citizen." App. at 84a.

On May 11, 1984, petitioner commenced this action in the United States District Court for the Eastern District of Louisiana. Petitioner alleged that respondent First National Bank of Commerce had denied him a Visa Card on account of his national origin and his status as a permanent resident alien, in violation of 42 U.S.C. § 1981.[1] The case was presented on the record to the District Court sitting without a jury.

The District Court found that the "record establishes unexplained and unreasoned discrimination against the

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1. Petitioner also alleged that the denial of credit violated the Equal Opportunity Credit Act ("EOCA"), 15 U.S.C. §§ 1691 *et seq.* No issue is presented here with respect to the EOCA.

plaintiff based upon his alienage, that is, his status as a noncitizen."[2] App. at 88a. Moreover, the Court found that the citizenship criterion "was not at the time of its adoption tailored and utilized so as to address meaningfully any valid concerns, such as the collectibility of accounts." App. at 83a. However, the District Court, stating that it "decline[d] to follow" established Fifth Circuit precedent on the matter, independently concluded without any analysis of this Court's decisions that Section 1981 "does not proscribe private alienage discrimination." App. at 88a.

A panel of the Fifth Circuit reversed, citing its prior controlling decision in *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (holding that Section 1981 prohibits private alienage discrimination). Although conceding *Guerra's* authority, Judge Gee nevertheless argued in his opinion for the panel that *Guerra* had been "wrongly decided" because it applied the "dubious analysis" of the Supreme Court's decisions in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Runyon v. McCrary*, 427 U.S. 160 (1976), to persons other than citizens. App. at 64a. Judge Gee disagreed with the legislative history of the 1866 Act which *Jones* explicated, and argued that even if the 39th Congress (which provided equal rights only for *citizens*) had intended to reach private discrimination, the 41st Congress (which extended the protection of the statute to all *persons* including aliens) did not intend the 1870 statute to reach private discrimination. App. at 47a-59a.

Sitting en banc, the Fifth Circuit on a 7-6 vote (with Judge Rubin not participating) overruled *Guerra*, and thereby affirmed the District Court's dismissal of petitioner's Section 1981 claim. App. at 1a-25a.

Judge Gee acknowledged in his plurality opinion that if Section 1981 were "given its broad, literal meaning," it would apply equally to aliens and minorities. App. at 2a. His plurality opinion also formally acknowledged that the Fifth Circuit was bound by this Court's decisions in *Jones* and *Runyon*. App. at 13a. And the plurality further recognized "that construing the same language to mean one thing as applied to one subset of 'persons'—blacks—and another as applied to a different one—foreign nationals—is awkward and undesirable." App. at 14a-15a.

Nevertheless, describing the reasoning of *Jones* and *Runyon* as "severely flawed," "faulty," and unable to "stand of its own force," App. at 13a, 14a the plurality believed itself "[r]elieved of the *Jones* and *McCrary* gloss, applied by the Court to the subset of *race*-based distinctions," and concluded that "it is patent that these words ["make and enforce contracts"] circumscribe state action only." App. at 16a (emphasis by the plurality) (brackets added).

In a special concurrence, Judge Higginbotham also conceded that "it is awkward to conclude that identical statutory language reaches private discrimination on the basis of race but not alienage," but decided that "the awkwardness is not conclusive." App. at 21a. Describing the question as "difficult" and "close," App. at 23a, Judge Higginbotham concluded that the Supreme Court "*could accommodate Jones* and *Runyon* with the conclusion that § 1981 . . . reaches private racial discrimination but requires state action for discrimination against aliens, in spite of the absence of supporting statutory language and the seeming incongruity that results." App. at 22a (emphasis and ellipsis added).

The six dissenters, in an opinion by Judge Reavley, described the "root and trunk" of the majority's argument as its "conviction that the legislative history of Section 1981 as outlined by the Court in *Runyon* is erroneous." App. at 25a. This position, the dissent pointed out, was foreclosed by the logical convergence of *Runyon* and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948):

> Thus, under *Takahashi*, section 1981 bans discrimination based on alienage, and, under *Runyon*, it bans discrimination in the making and enforcement of private contracts. From these two premises the holding of *Guerra* necessarily follows: section 1981 forbids private discrimination based on alienage. By what lights can we construe this statute giving "full and equal benefits of all laws" to benefit unequally the persons it protects?

App. at 24a-25a.

REASONS FOR GRANTING THE WRIT

The 7-6 majority decision of the en banc Fifth Circuit presents a direct conflict with this Court's decisions holding that Section 1981 prohibits discrimination against noncitizens based on alienage, and that Section 1981 prohibits discrimination in the making of private contracts.

As acknowledged by the Fifth Circuit majority, its decision also does not comport with the literal language of Section 1981 which guarantees to all *persons* the same right to make contracts as is enjoyed by white *citizens*. The majority's concededly "awkward" construction, App. at 15a, 21a, also eviscerates the intent of the 41st Congress

to extend the 1866 Civil Rights Act to bar alienage discrimination.

Contrary to precedent, literal statutory language, and legislative intent, the Fifth Circuit's majority decision withdraws an important legal protection from millions of legal residents.

For these reasons, as set forth more fully hereafter, the Writ of Certiorari should be granted.

1. The Fifth Circuit's Majority Decision Conflicts With This Court's Decisions Holding That § 1981 Prohibits Discrimination Against Aliens Based on Citizenship Status, and That § 1981 Prohibits Discrimination in the Making of Private Contracts.

Section 1981 provides in relevant part that "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (ellipses added).

In interpreting and applying this unequivocal guarantee, this Court has repeatedly held both that Section 1981's inclusion of "[a]ll persons" protects noncitizens from alienage discrimination, and that Section 1981's "make and enforce contracts" clause bars discrimination in the making of private contracts. The logical convergence of these lines of authority compels the conclusion that Section 1981 bars alienage discrimination in the making of private contracts.

This Court's recognition of Section 1981's prohibition of alienage discrimination is more than a century old. In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), where this Court held that Section 1981 protects

noncitizens from alienage discrimination, the Court pointed out that, "The protection of this section has been held to extend to aliens as well as to citizens." *Takahashi* at 419, citing *United States v. Wong Kim Ark*, 169 U.S. 649, 696 (1898); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See also, e.g., Graham v. Richardson*, 403 U.S. 365, 377 (1971) ("The protection of this statute has been held to extend to aliens as well as citizens").

In a parallel manner, this Court has repeatedly recognized that Section 1981 bars private sector discrimination in the making of contracts, a determination which was conclusively reaffirmed in this Court's 7-2 decision in *Runyon v. McCrary*, 427 U.S. 160, 168-75 (1976), and which was unanimously followed last Term in *Saint Francis College v. Al-Khazraji*, 481 U.S. —, —, 95 L.Ed.2d 582, 589 (1987). *See also, e.g., General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 387-88 (1982); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-86 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439-40 (1973); *cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (1969) (§ 1982); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-37 (1968) (§ 1982).

Although *Takahashi* and the similar cases applying Section 1981's protection of "[a]ll persons" to aliens have all occurred in the context of governmental discrimination, never has the Court suggested that its reasoning should not apply to private action. And although *Runyon* and the similar cases applying Section 1981's "make and enforce contracts" clause in the private sector have arisen in the

context of racial discrimination, never has this Court intimated that this clause would not apply to alienage discrimination.

Flowing ineluctably from these dozen decisions is the logical conclusion that Section 1981 bars alienage discrimination in the making of private contracts. This inescapable conclusion, in fact, was made explicit by Justice White (joined by Justice Rehnquist) in his dissent in *Runyon*: "The statute draws no such distinction among classes of persons. It logically must be construed either to give 'all persons' a right not to be discriminated against by private parties in the making of contracts or to give no persons such a right." *Runyon v. McCrary*, 427 U.S. at 206 (White, J., dissenting).[2]

The conclusion that § 1981 protects all persons and thus bars alienage discrimination in the private sector was reinforced last Term by Justice White's opinion for the unanimous Court in *Saint Francis College v. Al-Khazraji*, 481 U.S. —, —, 95 L.Ed.2d 582, 592 (1987), holding that Section 1981's ban on racial discrimination protects an Arab from private sector discrimination based on "ancestry or ethnic characteristics." *Cf. Shaare Tefila Congregation v. Cobb*, 481 U.S. —, 95 L.Ed.2d 594 (1987) (Section 1982 similarly protects Jews from private sector discrimination based on ancestry or ethnic characteristics).

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2. Justice White reasoned backwards from the 1870 Act to reach his then-dissenting view that no persons were protected: the 1870 Act grants aliens the same rights as black citizens; the 41st Congress could not have intended to prohibit private discrimination based on alienage in the making of contracts; therefore, Congress could not have intended to prohibit private discrimination based on race in the making of contracts.

The en banc majority below inexplicably declined to discuss *Takahashi* and this Court's similar alienage discrimination cases (other than to dismiss the relevance of *Takahashi* in a footnote response to the dissent); and it failed even to mention this Court's unanimous decision in *Saint Francis College*. Instead, the Fifth Circuit majority focused primarily on *Runyon* and argued that it had been wrongly decided. The conflict with this Court's decisions is patent.

2. The Fifth Circuit's Majority Decision Contravenes the Literal Statutory Language of § 1981, and Also Contradicts the Intent of the 41st Congress in 1870 to Extend the 1866 Civil Rights Act to Protect Aliens from Citizenship Status Discrimination.

Section 1981, as noted, guarantees to "All *persons*" including aliens the "*same right* . . . to make and enforce contracts . . . as is enjoyed by white *citizens*." 42 U.S.C. § 1981 (emphasis and ellipses added).

As this Court has pointed out, Section 1981 "had its source in the Civil Rights Act of 1866, 14 Stat. 27, as well as the Voting Rights Act of 1870, 16 Stat. 140, 144." *Saint Francis College v. Al-Khazraji*, 95 L.Ed.2d at 591; *see also Runyon v. McCrary*, 427 U.S. at 168 n.8.

Section 1 of the 1866 Act expressly protected only *citizens* from discrimination. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.[3] This limitation was amended by Section 16 of the 1870 Act, which expressly extended the protections of the 1866 Act to all *persons*. Act of May

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3. Section 1 of the 1866 Act is set forth in the Statutes Involved *supra*.

31, 1870, ch. 114, § 16, 16 Stat. 140, 144.[4] This change of language was not inadvertent: it was expressly intended to protect noncitizens from discrimination. "It is clear, for example, that the civil rights sections of the 1870 Act provided protection for immigrant groups such as the Chinese." *Saint Francis College v. Al-Khazraji*, 95 L.Ed. 2d at 591.

Although it is a well-settled rule of statutory construction that all words used in a statute must be given effect if at all possible,[5] the en banc majority nevertheless

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4. Section 16 of the 1870 Act is set forth in the Statutes Involved *supra*.

The 41st Congress also reenacted the 1866 Act through Section 18 of the 1870 Act, again using the word *persons*. Section 18 of the 1870 Act provides:

> *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144 (emphasis in the Act).

5. As this Court has repeatedly observed, it is a "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973), quoted with approval in *Administrator, FAA v. Robertson*, 422 U.S. 255, 261 (1975). *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used").

This rule of statutory construction is particularly applicable here given that the "approach of this Court to . . . Reconstruction civil rights statutes . . . has been been to 'accord [them] a sweep as broad as [their] language.'" *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (ellipses added) (brackets by the Court), quoting from *United States v. Price*, 383 U.S. 787, 801 (1966).

decided that Section 1981's statutory language guaranteeing the same rights to all *persons* as enjoyed by white *citizens* in making contracts was not to be given effect, and that instead different and much lesser rights were somehow provided to noncitizens.

Recognizing that this is not what the statute itself expressly provides, Judge Gee in his plurality opinion and Judge Higginbotham in his swing-vote concurring opinion both conceded that their statutory construction was at best "awkward." App. at 15a, 21a. But it is more than just awkward. In fact, "the majority's argument is logically impossible, because it has the effect of construing the language '*the same rights to make . . . contracts . . . as is enjoyed by white citizens*' . . . to mean one thing with respect to one class of 'persons' and another thing with respect to another class of 'persons.'" *Runyon v. McCrary*, 427 U.S. at 206 (White, J., dissenting) (emphasis and ellipses by Justice White).

The majority's impossible construction contravenes not only the plain language of Section 1981, but also the explicit intent of the 41st Congress to protect noncitizens from alienage discrimination on the same terms as provided in the 1866 Act.

In describing the effect of Section 16 of the 1870 Act, Senator Stewart of Nevada, the author and sponsor of the bill, pointed out that the "original civil rights bill [Section 1 of the 1866 Act] protected all persons born in the United States," and that "[t]his bill extends it to aliens." Cong. Globe, 41st Cong., 2d Sess. 1536 (1870) (brackets added). Somewhat more expansively, Senator Stewart explained that his bill "extends the operation of

the civil rights bill [Section 1 of the 1866 Act], which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill." *Id.* (brackets added).

The primary motivation for this bill was to protect Chinese immigrants on the West Coast. As Senator Stewart explained:

> We have pledged the honor of the nation that they may come and shall be protected. For twenty years every obligation of humanity, of justice, and of common decency toward those people has been violated by a certain class of men—bad men I know; but they are violated in California and on the Pacific coast.

Id. at 3658. Speaking of these Chinese immigrants, Senator Stewart added that "if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill." *Id.*

In reviewing this legislative history, the plurality of the Fifth Circuit below disregarded the obvious import of Congress' intent by arguing that the 1870 Act was intended to do no more than to guarantee aliens equal protection of the laws. App. at 4a-16a. The legislative history, to be sure, does contain references to equal protection of the laws, *id.*, but these references do not place an outside limit on a broader congressional intent.

First, even where the express language of a statute such as 42 U.S.C. § 1985(3) bars deprivations only of equal protection of the laws, "there is nothing inherent in the phrase [equal protection of the laws] that requires the action working the deprivation to come from the State."

Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (brackets added) (holding that 42 U.S.C. § 1985(3), which is derived from the 1871 Civil Rights Act, reaches private discrimination). Here, where the phrase appears only in the legislative history of the 1870 Act, there similarly can be nothing in the phrase that requires the action denying the right to make contracts to come only from the state.

Second, there can be no question that one of the purposes of the 41st Congress was to "extend" "to aliens" the protection of a law, Section 1 of the 1866 Act. Cong. Globe at 1536. As the six-member dissent pointed out below, "By what lights can we construe this statute giving 'full and equal benefits of all laws' to benefit unequally the persons it protects?" App. at 24a-25a.

And, finally, there simply is no longer any question that Section 1 of the 1866 Act, which was extended to aliens by Section 16 of the 1870 Act, bars discrimination in the making of private contracts. *See, e.g., Runyon v. McCrary*, 427 U.S. at 168-75; *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 420-37.

The majority's views expressed below eviscerate the intent of the 41st Congress.

3. The Fifth Circuit's Majority Decision Withdraws from Millions of Legal Residents an Essential Legal Protection Against Debilitating Discrimination.

There are roughly seven million foreign-born persons who are legal permanent residents of the United States

but who are not yet naturalized citizens.[6] These lawful residents passed rigorous screening in order to be admitted, and most have been here for many years.

"Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). And they concededly " 'contribute to the economic growth' " of our country. *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (citation omitted).

Yet, the denial to these individuals of basic contractual rights such as denying them "the opportunity of earning a livelihood" is tantamount to denying them "entrance and abode." *Truax v. Raich*, 239 U.S. 33, 42 (1915); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). From the perspective of these lawful permanent residents—much less the perspective of the 41st Congress—it matters little whether the denial of basic economic rights (in, for example, commercial fishing) occurs through the operation of a state law, *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), or through private acts of intimidation. *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (preliminary injunction); 543 F. Supp. 198 (S.D. Tex. 1982) (permanent injunction).

Although Judge Gee argued in the plurality opinion below that alienage discrimination is reasonable because of national security concerns in the defense industry, App.

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6. Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States 1985, 87* (Government Printing Office, 1985).

at 13a, these concerns are not pertinent to this case. Petitioner, an accountant, merely sought and was denied a credit card, an indicator of creditworthiness which is ordinarily essential for a business person (much less a family) to reserve a hotel room, to rent a car, and to build a credit rating.

The Fifth Circuit majority's removal of Section 1981's contractual protection from lawful permanent residents solely because of their citizenship status marks an unfortunate departure from precedent that can only serve to recreate the types of invidious discrimination among individuals that Congress and this Court have long sought to abolish. Here, where the 41st Congress sought to extend to aliens the *same* right to make contracts as is enjoyed by white citizens, the lower court's interpretation requires an abandonment not only of normal principles of statutory construction but of our rules of equality as well.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a Writ of Certiorari issue to review the majority decision of the en banc Court of Appeals for the Fifth Circuit.

DATED: February 2, 1988.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3445

JEETENDRA BHANDARI,

Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF COMMERCE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(October 5, 1987)

Before CLARK, Chief Judge, GEE, RUBIN,* REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

GEE, Circuit Judge:

The appellee bank denied appellant Jeetendra Bhandari credit partly because he was, although a lawful permanent resident of the United States, not a citizen. In the ensuing lawsuit, the district court held that 42 U.S.C. § 1981 gave no remedy for discrimination against aliens by

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* Judge Rubin stood recused and did not participate in this cause.

private persons, deciding, as well, other questions not pertinent here. It did so despite our contrary decision in *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (1974), because it believed that *Guerra* had been wrongly decided and was no longer good law.[1] A panel of our court reversed, 808 F.2d 1081; and we took the appeal en banc to resolve the issue—a vexed and difficult one of its very nature, rendered more urgent by recent developments in Immigration Law familiar to anyone likely to read these words.

The question is whether in this day and time we should link together inseparably the legal protections accorded all persons against race-prejudice by their fellows in our society with those accorded the foreign nationals among us against alienage discrimination. Reflection persuades us that they would be curious mates in harness: the impulses that might move Smith, a white United States citizen, say, to discriminate against Jones, a black United States citizen, are unlikely, we think, to bear much in common with those which might move him to discriminate against Kirov, a Ukranian citizen of the U.S.S.R. legally resident in this country—let alone against Lopez, an illegal Mexican immigrant. Yet § 1981, which commences with the phrase "All persons within the jurisdiction of the United States," applies equally to Jones, Kirov and Lopez, if given its broad, literal meaning. It has been said that there is no greater injustice than to treat unequal

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1. The district court cited *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340, 344 (5th Cir. 1981) and *Campbell v. Gadsden County District School Board*, 534 F.2d 650, 653-54 n. 8 (5th Cir. 1976) as casting *Guerra* in question.

things equally,[2] and we are not disposed to do so in this instance unless the Congress has clearly demanded it. This it has not done in the instance of § 1981, a statute of all but Constitutional sweep and breadth; and, for the reasons that follow, we decline to yoke § 1981's protections against alienage discrimination to those against discrimination on racial grounds.

The Statute and Its History

Section 1981 declares:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Since 1968, when the Supreme Court, in *Jones v. Alfred Mayer Co.*, 392 U.S. 409, commenced recalling the Civil War Rights Statutes into service after a century's desuetude, countless words and endless energy have been expended by courts, including the Supreme Court, in attempts to assign meaning and rational limits to these broad and majestic enactments. The extreme difficulty of this task stems in great part from the Court's initial rejection, in *Jones*, of what seems the natural interpretation of § 1981: that it directs States and Territories to grant each and every group of humans, no matter

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2. Aristotle, *Politics*.

how defined or classified, the same rights in their *courts* and under their *laws* as they grant white citizens—no more, no less. If this natural construction be rejected, another is not easily found, much as though a student had been that any answer was acceptable as the sum of two plus two except four and directed to find another suitable one.[3] Four members of the Court have since expressed varying degrees of disagreement with this rejection, *see Runyon v. McCrary*, 427 U.S. 160, 186-214 (1976); but it of course forecloses the acceptance of any such construction by us. Whatever § 1981 may mean, then, it is not what it seems to say.

The panel opinion in this appeal, as well as *Jones* and subsequent Supreme Court opinions, laboriously traced and retraced the genesis of the Civil War Statutes in the 1866 Civil Rights Act[4] and the 1870 Voting Rights Act;[5] and there is scant need to do so again today. Suffice it to say that *Runyon v. McCrary*, 427 U.S. 160, 170 (1976), determined that § 1981 derived in part from § 1 of the 1866 Act. The concern in *Runyon* was racial discrimination in matters of private contract, and the Court's emphasis fell naturally and properly on that source for § 1981 which treated of racial discrimination against citizens and others. Insofar as it extends protection against non-racial dis-

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3. Thus Justice Stevens has joined the Supreme Court's holding that § 1981 prohibits only intentional discrimination when used against private parties, but has opined that government violations of violations of § 1981's equal protection component do not require discriminatory intent. *See General Build-Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 406 (1982) (Stevens, J., concurring).

4. Act of April 9, 1986, ch. 31, 14 Stat. 27.

5. Act of May 31, 1870, ch. 114, 16 Stat. 140.

crimination to aliens, however, § 1981 of necessity derives from a different source—the 1866 Act having had nothing to say on the subject of alienage.

As the Supreme Court has noted, the 1866 Civil Rights Act—which concerned itself primarily with *racial* discrimination against *citizens*—was principally motivated by a Congressional purpose to extirpate the Black Codes, Southern laws imposing a wide range of civil disabilities upon the newly-freed blacks. *General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 386 (1982). Section 16 of the 1870 Voting Rights Act, by contrast, from which § 1981's protection for aliens is derived, had a different source—a legislative stream that sprang from the solicitude of its sponsor, Senator Stewart of Nevada, toward Chinese aliens subject to degrading treatment under the laws of California.[6]

Section 16 had its genesis in a resolution proposed by Senator Stewart and unanimously approved by the Senate on December 6, 1869:

> RESOLVED, That the Committee on the Judiciary be requested to inquire if any States are denying to any class of persons within their jurisdiction the

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6. "Whatever one may think of the ultimate outcome of the case [*Runyon*], it is quite clear that the Court seriously misread the legislative history of § 1981. The evidence is simply indisputable, as Justice White recognized in his lengthy dissenting opinion, that § 1981 derives from § 16 of the Civil Rights Act of 1870, a statute that was not designed—at least not in any primary sense—to promote the civil rights of the nation's newly emnacipated black citizens, but rather to respond to the plight of another aggrieved racial minority—the Chinese of California." McClain, *The Chinese Struggle for Civil Rights in Ninetneenth Century America: The First Phase, 1850-1870*, 72 Calif. L. Rev. 529, 530 (1984).

> equal protection of the law, in violation of treaty obligations with foreign nations and of *section one of the fourteenth amendment* to the Constitution; and if so, what legislation is necessary to enforce such treaty obligations and such amendment, and to report by bill or otherwise.

Cong. Globe, 41st Cong., 2d Sess. 3 (1869) (emphasis added).

About a month later, Senator Stewart introduced a bill, S.365, which became a foundation of the law which we construe.[7] In doing so, he described his view of the effect of S.365:

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7. S.365 was eventually incorporated into the 1870 Act. See remarks of Sen. Trumbell, Cong. Globe at 4307. Its language was almost identical to §§ 16, 17 and 18 of the 1870 Act:

> *Be it enacted, & c.,* That all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.
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> *Sec. 2. And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person be-

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> The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill.

Cong. Globe at 1536.

It is chiefly on the basis of part of this passage, the assertion that the bill "extends the operation" of the 1866 Act to aliens, that our panel in *Guerra*, 498 F.2d at 653, and the district court in *Espinoza v. Hillwood Square Mutual Ass'n.*, 522 F.Supp. 559 (E.D. Va. 1981), which followed *Guerra's* reasoning, concluded that § 16 was meant to forbid private alienage discrimination. This construction of his words, however, follows only on the assumption that

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> ing an alien, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding $1,000 or imprisonment not exceeding one year, or both, in the discretion of the court.
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> Sec. 3. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reenacted, and said act, except the first and second sections thereof, is hereby referred to and made a part of this act.

Cong. Globe at 1536. There are only three material differences: the "Indian" clause in the first section was dropped; the phrase "white persons" in the second section was changed to "citizens;" and the second part of the third section was changed to make clear that the 1870 Act was to be enforced according to the enforcement provisions of the 1866 Act. (Also, "emigrating" was changed to "immigrating.")

Senator Stewart viewed the 1866 Act as reaching private discrimination—a dubious assumption indeed in view of his repeated reference to equal protection of the laws. As the passage quoted below makes perhaps too amply clear, his remarks are literally peppered with such references. Considering these and the actual words of S.365, it seems far more likely that Senator Stewart viewed the bill as directed at state action. The Revisers thought likewise in 1874, giving § 1981 its present title "Equal Rights Under the Law"; and the Supreme Court remained of that view at least as late as the *Civil Rights Cases*, 109 U.S. 3, 16 (1883) and probably much longer, *see Hurd v. Hodge*, 334 U.S. 24, 31 (1947) (§ 1982 "is directed [at] governmental action" and "does not invalidate private restrictive agreements").

But to return to the legislative history of § 16, S.365 next surfaced when Senator Stewart offered a slightly modified version as part of Senator Edmund's S.810, aimed to enforce fifteenth amendment voting rights. His remarks in doing so evidence unmistakably that he, as author and original sponsor, saw the provisions as implementing the fourteenth amendment:

> While [Chinese aliens] are here I say it is our duty to protect them. I have incorporated that provision [S.365] in this bill on the advice of the Judiciary Committee, to facilitate matters and so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be developed upon this Congress to see that those people are protected, to see they have *the equal protection of the laws*, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the *State* courts do not give them *the equal protection of the law*, if public sentiment is so inhu-

> mane as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill, and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them *a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are.* That is all there is in there is in that provision.
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> Why is not this bill a good place in which to put that provision? Why should we not put in this bill a measure to enforce both the *fourteenth* and fifteenth amendments at once? The *fourteenth amendment* to the Constitution says that no *State* shall deny to any person *the equal protection of the laws.* Your treaty says that they shall have *the equal protection of the laws.* Justice and humanity and common decency require it. I hope that provision will not be left off this bill, for there is no time to take it up as a separate measure, discuss it, and pass it at this session.

Cong. Globe at 3658 (emphasis added). What more could he have said?

The Senate passed H.R.1293 (including the provisions of S.365) the following day. Cong. Globe at 3690.[8] The

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8. H.R. 1293 was passed by a vote of 43-8 under the title "A bill to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union." Senator Stewart moved to amend the title.

> Mr. STEWART. Add there the words "and for other purposes."
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> Mr. SUMMER. Why do you want to have "other purposes" in?

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rest of the legislative history of § 16 in both the House and the Senate[9] is completely consistent with the soliloguy of its author and original sponsor Senator Stewart. *See* generally *McCrary*, 427 U.S. at 195-205, 96 S.Ct. 2606-2611 (White, J., dissenting) (reviewing the history of § 16 of the 1870 Act as part of his unsuccessful argument that § 1981 was derived entirely from the 1870 Act). Whatever the intentions behind the 1866 Act, it seems clear that the 1870 Act was passed as a statutory implementation

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> Mr. STEWART. Here is a provision to enforce the fourteenth amendment. Strike out all after "Union" and insert "and for other purposes."
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> Mr. SUMMER. That is the whole case.
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> Mr. STEWART. No; the fourteenth amendment, to prevent improper holding of office, and then the civil rights bill have been put on.

The motion passed and the title was amended. Cong. Globe at 3690.

9. There was sharp debate over the voting rights bill leading to the 1870 Act, but little mention of the section that became § 16 and eventually § 1981. In one of those few passages, Senator Sherman ruminated about S.810 and S.365:

> These bills seem to have the sanction of the Judiciary Committee. Probably after examination I might approve them; but they are certainly adding an independent subject, making it necessary to change the title of this bill, to change the scope of it, to enlarge greatly the purpose for which the House bill [H.R.1293] was passed, because *these provide for enforcing the fourteenth amendment* as well as the fifteenth, and provide also for dragging into the controversy the Chinese question and questions of that kind. I am not sure but that after discussion I would agree with the Committee on the Judiciary, that we must *protect the Chinese against the local laws of California;* but it seems to me we ought to do it with our eyes open, and understand what we are doing.

Cong. Globe at 3570 (emphasis added).

of the fourteenth amendment, and that the Congressional intent as to it was to curtail *state* action discriminating unfairly against aliens.

Thus the legislative history: To us it appears to indicate with great clarity that Congress's intent in passing § 16 was, in Senator Sherman's trenchant formulation, to ". . . protect the Chinese against the local laws of California . . . ."[10] Section 16 was never reenacted by the Congress, as was the 1866 Act as § 18 of the 1870 Voting Rights Act; and there is no further latent for us to seek than that with which it was originally passed.[11] In Senator Stewart's recurring phrase, "That is all there is in the bill."

Later Developments

Matters did not rest there, however. As we note above, in 1968 the Supreme Court entered upon a series of landmark decisions that called the Nineteenth Century Civil Rights Statutes back into service. The first of these,

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10. See note 9 above.

11. That of the Revisers who incorporated § 16 into the redacted § 1981 was not a legislative one, and they of course lacked power to legislate. Rather, they were appointed pursuant to the Act of June 27, 1866, ch. 140, 14 Stat. 74, reenacted by Act of May 4, 1870, ch. 72, 16 Stat. 96, "to revise, simplify, arrange, and consolidate all statutes of the United States. . . ." § 1, 14 Stat. at 74. Congress commanded them to "bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text. . . ." § 2, 14 Stat. at 75.

The Revisers' powers were thus housekeeping, not legislative, ones; and the intent with which they acted does not signify.

Jones v. Alfred Mayer Co., 392 U.S. 409, declared that § 1982—a companion to § 1981 governing rights in property—forbade *private racial* discrimination. Justice Harlan, joined by Justice White, dissented, characterizing the opinion as "most ill-considered and ill-advised" and raising against it the arguments rehearsed again by our panel at 808 F.2d, at 1092-1097. These need not be repeated here. Suffice it to say that, although they did not carry the day, by the time the Court next spoke in the general area they had apparently persuaded at least four members of it that *Jones* was wrongly decided.

For eight years after *Jones* came *Runyon v. McCrary*, 427 U.S. 160 (1976), in which the Court transposed the § 1982 reasoning of *Jones* onto § 1981, holding that racial discrimination in matters of private contracts generally was forbidden by it. By now, serious misgivings about this course of reasoning had begun to trouble some members of the Court. Justice White, joined by (then) Justice Rehnquist, filed an eloquent dissent which built upon that of Justice Harlan in *Jones*. Justice Powell, conceding that he was almost persuaded by Justice White's reasoning, declined to join his dissent because he felt obliged to adhere to *Jones* and other recent decisions of the Court which he had joined; and Justice Stevens, declaring a firm "... conviction that *Jones* was wrongly decided" and "would have amazed the legislators who voted for" the Civil Rights Act of 1866, nevertheless adhered to it as "an important part of the fabric of our law." 427 U.S., at 189-90.

But none of these opinions decides the question in today's case: whether these venerable enactments extend

to forbidding citizens of the United States to draw *private* distinctions between other citizens and aliens on grounds, not of race, but of *nationality*.[12] For us, of course, there is no question whether to adhere or not to *Jones* and *McCrary;* they are part of our marching orders, mandates which we can either obey or seek other work. But that is not the issue. The issue is whether, because the Supreme Court reasoned in a particular manner on one subject, we are obliged to extend that reasoning, when it seems to us—and not to us only—severely flawed, to a new series of situations to which the Court has not yet spoken.

The dissent cuffs the issue away in a few paragraphs simply reiterating the extension in *Guerra*—without stated reasoning or explanation—of *Jones's* faulty analysis from *racial* discrimination to private distinctions based on nationality. We think a decision which mandates, among other things, that a Libyan or Iranian citizen cannot legally be denied employment as a designer of coding equipment with a defense contractor on the grounds of divided loyalties merits a brief explanation of why it is thought to be required by statute. Convinced that a proper subordination does not require such a course of action and that good conscience argues against it, we decline to embark upon it.

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12. The dissent confidently asserts that "[a]s early as *Takahashi* . . . the protection of [§ 1981 had] been held to extend to aliens," citing to *Graham v. Richardson* as well. Ms. Op. p. 3. Both *Graham* and *Takahashi*, however—the only Supreme Court § 1981 alien cases cited by the dissent—plainly rest on a state-action/Fourteenth Amendment analysis; and no Supreme Court case has yet held what the dissent would hold today.

Analysis

For the reasons expressed by Justice White in his *McCrary* dissent, and echoed by most observers who take the view that words have an ascertainable meaning, it seems to us beyond serious dispute that the reasoning of *Jones* and *McCrary* cannot stand of its own force. The Supreme Court's last expressions on the subject of whether § 1981 was intended to reach *private, racial* discrimination are to be found in *McCrary*, however; and these reflect the considered judgment of the Court as then constituted that, right or wrong, the issue has been decided and laid to rest. This is the voice of authority, and there —for our Court—the matter ends: it reaches such discrimination. Neither reason nor authority, however, constrains us to rule that it forbids the drawing of private distinctions between persons based on *citizenship*.[13]

Certainly reason does not; by the time of Justice Powell's resignation, a majority of the sitting Justices who had expressed official views on the point had concluded that *Jones* was wrongly decided. If it was, there is no occasion to extend its flawed reasoning to a new subject. Clearly authority does not require us do so, as the Court has not spoken to the issue and has hinted, at least, that it regards it as an open one.[14] It cannot be denied, however, that construing the same language to mean one thing as applied to one subset of "persons"—blacks—and another as applied to a different one—foreign

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13. That the Fourteenth Amendment forbids public ones in most instances is settled. *Bernal v. Fainter*, 467 U.S. 216 (1984).

14. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 96 n. 9 (1973).

nationals—is awkward and undesirable. Indeed, it was on that basis that Justice White, assuming that the answer to the issue before us could only be as we decide it today, argued against the *McCrary* result:

> [A]s noted above, § 1977 [present § 1981] of the Revised Statutes was passed by Congress with the Revisers' unambiguous note before it that the section derived solely from the Fourteenth Amendment statute, accompanied by the confirmatory sidenote "equal rights under the law." Second and more importantly, the majority's argument is logically impossible, because it has the effect of construing the language "*the same rights to make . . . contracts . . . as is enjoyed by white citizens*," contained in § 1977 of the Revised Statutes, to mean one thing with respect to one class of "persons" and another thing with respect to another class of "persons." If § 1981 is held to be a reenactment of the Thirteenth Amendment statute aimed at private discrimination against "citizens" and the Fourteenth Amendment statute aimed at state-law-created legal disabilities for "all persons," including aliens, then one class of "persons"—Negro citizens—would, under the majority's theory, have a right not to be discriminated against by private individuals and another class—aliens—would be given by the same language no such right. *The statute draws no such distinction among classes of persons. It logically must be construed either to give "all persons" a right not to be discriminated against by private parties in the making of contracts or to give no persons such a right. Aliens clearly never had such a right under the Fourteenth Amendment statute (or any other statute); § 1977 is concededly derived solely from the Fourteenth Amendment statute so far as coverage of aliens is concerned; and there is absolutely no indication that aliens' rights were expanded by the reenactment of the Fourteenth Amendment statute in § 1977 of the Revised*

> *Statutes of 1874.* Accordingly, the statute gives no class of persons the right not to be discriminated against by private parties in the making of contracts.

427 U.S., at 205-6 (first emphasis in original; second emphasis added).

In the teeth of his argument, however, the Court did as it did; and in at least one later instance it has construed identical language to mean one thing as to one group, another as to a different one. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) ("prevailing party" in Civil Rights Attorneys' Fee Statute means one thing as to party plaintiff, another as to party defendant). In today's case, given the fact that § 1981 is a redactor's amalgam of two different enactments, each aimed at a different group, the objection, while troubling, carries less force than it would in such a case as *Christiansburg*, where a single enactment was differentially construed in respect of persons so as to favor plaintiffs over defendants.

Thus it appears that in today's case nothing in Supreme Court precedent forbids us to accord the words of § 1981—as they apply to aliens—their natural meaning. Relieved of the *Jones* and *McCrary* gloss, applied by the Court to the subset of *race*-based distinctions, it is patent that these words circumscribe state action only. And, in addition to their obvious intent, various circumstances and developments since their resurrection as to race in *Jones* reinforce this conclusion. Many of these are peripheral and circumstantial, but added together they have weight.

One of these is the very innocence displayed by several well-informed observers present on the factual scene of any suspicion that § 1981 might have been intended to control citizens in their private dealings with non-citizens.

That it was not so intended, Justice White, in his dissent partially quoted above, thought so obvious that he founded an argument upon it, one that § 1981 could not be held to cover private racial discrimination because to hold that it did would logically compel a parallel and unthinkable holding that it covered alienage. And a few years before, in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), § 1981 was not even advanced by counsel as an alternate ground in that lawsuit's attempt to equal alienage with "national origin" discrimination for Title VII purposes.

As for Congress's view of the matter, it can scarcely be an oversight that, although it included the categories of "race, color, religion, sex [and] national origin" in the general Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, that of *citizenship* is nowhere to be found; and the Supreme Court has expressly held that the term "national origin" as there employed does not embrace it. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

Instead, when Congress determined that because of its Immigration Reform and Control Act of 1986 there was reason to fear serious and widespread discrimination in employment on the basis of alienage, it enacted § 274B (a)(1) of that Act (8 U.S.C. § 1324B) to prevent this:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment, or referral for a fee . . . the discharging of . . . [an] individual . . .
>
> > (A) because of such individual's national origin, or
> >
> > (B) in the case of a citizen or intending citizen . . . because of such individual's citizenship status.

These actions are hardly those of a legislator which was of the view that alienage is a category appropriately yoked to race in anti-discrimination legislation,[15] or that § 1981 already prohibited private employment discrimination on alienage grounds to the same rigorous and stringent degree as *McCrary* declares that it forbids such racial discrimination. Had such a law, with such prohibitions, been already in place, there would have been no occasion for the heroic exertions that must have been called for to pass such a provision as § 1324B. And, on the other hand, if § 1981 has been correctly interpreted by *Guerra* to protect all aliens, legal and *illegal*, from employment discrimination, then it necessarily follows that the 1986 Immigration Act either "repeals" § 1981 to the extent that it has been read to protect *illegal* aliens from employment discrimination or remits illegals to whatever their § 1981 remedies may be, while denying them any under the 1986 Act. Neither result seems one that Congress likely intended.

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15. Indeed, the Supreme Court has recognized a "political function" exception to the strict scrutiny ordinarily accorded laws discriminating on the basis of alienage, one that permits the exclusion of such persons on a rational basis test from "positions intimately related to the process of democratic self-government," such as members of police forces, public school teachers, probation officers, and the like. *Bernal v. Fainter*, 467 U.S. 216 (1984); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 941 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978). That such an exception on racial grounds would be unthinkable reinforces our conclusion that treating racial and alienage distinctions as governed by the same rules was never intended. Despite his obvious over-qualification for the position, for example, one may well stick at an interpretation of § 1981 which forbids Boeing Aircraft to refuse employment as its Director of Research and Development to General Secretary Gorbachev because he is a Soviet citizen.

Conclusion

However laudable its cause and purpose, the reasoning which led the Supreme Court to construe § 1981 as reaching private racial discrimination has now been called in serious question by three present members of the Court itself, as well as by the late Justice Harlan and by retired Justice Powell. In these circumstances, it would be inappropriate for us to extend that reasoning across the board to forbid all private alienage distinctions, especially when the language of the statute is to the contrary, when the original enactment from which it was drawn even more clearly was limited to public alienage discrimination alone, and when reasonable inferences from later Congressional enactments indicate a contrary intent. —

Racial and citizenship distinctions are things of a different kind. The former is, for the individual, immutable; the latter is not. The former our polity and increasingly our society as well are resolved, and rightly resolved, to have done with, root and branch, as representing an evil, always and everywhere. The latter is not so readily and roundly condemned: when all is said and done, patriotism remains a civic virtue; and one whose allegiance is bound to another nation may not be suited for certain callings in ours, as the Supreme Court itself has recognized.[16] And while the alien guest is not without his own special claims upon us, arising from our moral tradition,[17] they are of a

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16. See note 14 above.

17. *E.g.*, "When an alien settles with you in your land, you shall not oppress him. He shall be treated as a native born among you, and you shall love him as a man like yourself, . . ." 19 Leviticus 33 (New England Bible).

different quality from those grounded in our common humanity. For these reasons, we conclude that *Guerra* was wrongly decided and that its extension of the faulty *Jones* analysis, by simple fiat and without supporting reasoning, from race to nationality was improper. We overrule it.

Except as modified by the panel opinion and by this opinion, we AFFIRM the judgment of the district court and REMAND the cause for further proceedings.

HIGGINBOTHAM, Circuit Judge, specially concurring:

I add this explanation of my resolution of what for me is the most difficult issue in this case—whether we are being faithful to our obligation as an inferior court to obey decisions of the United States Supreme Court.

Obedience by inferior courts to the command of the Supreme Court is essential to the administration of our complex court structure. For the Supreme Court to fulfill its unique role set by Article III, the federal system simultaneously must encourage candid expression by inferior courts while demanding acceptance of the Supreme Court's role as the final arbiter. This inherent tension now is increased because the Supreme Court's annual capacity for written opinions is approximately 150, an apparent constant, while inferior courts are producing a rapidly increasing number of decisions. This reality reinforces the traditional values of stare decisis. As an inferior court we must not allow our version of a "correct" result to deceive us into semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue.

The notion that as an inferior court we are free to strip content from principle by confining the Supreme

Court's holding to the precise facts before it is a heady assertion indeed; that notion ignores our role. Our duty to the Supreme Court precedent is broader than our duty to abide our own precedent and that of courts on our level. When the duty of obedience flows horizontally and not vertically, a later court may appropriately after due regard for our necessary dependence upon panel harmony in a multi-panel court and to the values of stare decisis such as predictability and settlement of expectation, confine the first case to its facts by concluding, in the words of Karl N. Llewellyn, that: "This rule holds only to red-headed Walpoles in pale magenta Buick cars." Our duty is different when the reach of precedent is vertical.

We are about words and ideas, not mechanics, and defining the margin of our duty is a slippery undertaking. That Justices Harlan and White detailed the statutory interpretation that we repeat today is not enough. It is true that at least five members of the court (before Justice Powell's retirement) have been persuaded that the earlier readings of history were wrong, but at least two of the five Justices would adhere to the holdings of *Jones* and *Runyon*, though they rested on a view of history the Justices no longer credit. Accepting these holdings our result admittedly is awkward. While it is awkward to conclude that identical statutory language reaches private discrimination on the basis of race but not alienage, the awkwardness is not conclusive. Justice Stevens has pointed out, the awkwardness arises because "[t]he Court has broadened the coverage of § 1981 far beyond the scope actually intended by its authors."

The difficulty of two meanings in identical language is also mitigated by the circumstance that the Court, al-

though abiding the holdings of *Jones* and *Runyon*, has been willing to make § 1981 fit with principles of the fourteenth amendment, even where § 1981's text might indicate otherwise. The Court did so in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), holding that § 1981 prohibits only wilful racial discrimination. Justice Stevens explained that because in his reading the 39th Congress never intended for § 1981 to reach employment discrimination, the legislative history was an improbable source for answering the question of whether the statute should be read to forbid only intentional conduct. Because the statute itself did not require proof of intent "a logician would be comfortable in concluding that no such proof should ever be required." *Id.* at 406.

Justice Stevens then concluded:

> Nevertheless, since that requirement tends to define the entire coverage of § 1981 in a way that better reflects the basic intent of Congress than would a contrary holding, I concur in the conclusion [that intent must be shown] . . . insofar as it relates to the statutory protection of equal opportunity but, perhaps illogically, would reach a different conclusion in a case challenging a denial of a citizen's civil rights.

Id. at 406.

This suggests that the Court could accomodate *Jones* and *Runyon* with the conclusion that § 1981, in parallel with the thirteenth and fourteenth amendments, reaches private racial discrimination but requires state action for discrimination against aliens, in spite of the absence of supporting statutory language and the seeming incongruity that results. The vertical command of precedent in *Jones* and *Runyon*, then, although not completely clear, is

not much more than the *ratio decidendi:* § 1981 reaches private racial discrimination. In these unique circumstances where the Justices themselves have peeled cases to their holdings, we are justified in declining an extension that in other circumstances we might properly be duty bound to make.

The matter is further complicated because we are asked to interpret a congressional enactment. Courts must be particularly circumspect in reconsidering decisions interpreting statutes. Just as a working federal judiciary demands vertical adherence to precedent, there is a point at which the orderly accomodation of law-making and law-interpreting demands that we resist reconsideration because Congress may well have acquiesced in prior statutory interpretations. Yet I see little reason to believe that Congress has assumed the *extension* of § 1981 that we today reject, especially given that, as Judge Gee notes, Congress has acted in a way inconsistent with the view that private discrimination against aliens is prohibited. Congress, however, has not signaled its disagreement with the Court's construction of § 1981 reach of private *racial* discrimination. *See Runyon v. McCrary*, 427 U.S. 160, 174 n.11 (1975).

As made plain by this separate writing, I find the issue of precedent to be difficult, and it is only after pause that I have found the side of the line on which this case falls. While this is a close case, this is not a seldom encountered task. Only recently we confronted a similar problem in dealing with border searches. There, Judge Reavley, Judge Garwood and I concluded that *United States v. Ortiz*, 95 S.Ct. 2585 (1975), could not be given the restrictive reading that others would give it and we fol-

lowed its command. *See United States v. Jackson* (5th Cir. Aug. 17, 1987), slip op. 6179, 6203, 6204. Persuaded that today we are adhering to a principled line, I agree that having explained our position we ought to stand in place pending further direction from our superiors.

REAVLEY, Circuit Judge, with whom POLITZ, RANDALL, JOHNSON, WILLIAMS, and DAVIS, Circuit Judges, join, dissenting:

The majority today overrules *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), and holds that 42 U.S.C. § 1981 does not reach private discrimination based on alienage. I respectfully insist that this holding is foreclosed to us by the decisions of the Supreme Court.

As early as *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142-43, 92 L.Ed. 1478 (1984), the Court, after quoting the predecessor of section 1981, stated: "[t]he protection of this section has been held to extend to aliens as well as to citizens." The Court reiterated its commitment to this principle in *Graham v. Richardson*, 403 U.S. 365, 377, 91 S.Ct. 1848, 1855, 29 L.Ed. 2d 534 (1971). In *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 2593, 49 L.Ed.2d 515 (1976), the Court stated: "[i]t is now well established that . . . 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts." Thus, under *Takahashi*, section 1981 bans discrimination based on alienage, and, under *Runyon*, it bans discrimination in the making and enforcement of private contracts. From these two premises the holding of *Guerra* necessarily follows: section 1981 forbids private discrimination based on alienage. By what lights can we construe this statute giving "full

and equal benefits of all laws" to benefit unequally the persons it protects?

The root and trunk of the majority's holding is the conviction that the legislative history of section 1981 as outlined by the Court in *Runyon* is erroneous. The author of a law review article is quoted in footnote 6 to say that the Court has misread the legislative history of the statute. Then we are told that the Supreme Court's reasoning is "severely flawed." Suffice it to say that while authors of law review articles enjoy the luxury of finding Supreme Court reasoning "severely flawed," the Fifth Circuit Court of Appeals is not at liberty to decide a case on this ground. Incidentally, this court has followed the dictate of that "flawed" reasoning for a long time. Our leading case in this area is *Sanders v. Dobbs Houses, Inc.*, 421 F.2d 1097 (5th Cir. 1970). As we said in *Guerra*, "[w]e held in *Sanders* . . . that § 1981 extends to private discrimination in employment, and we have reaffirmed Judge Clark's cogent *Sanders* opinion many times since." 498 F.2d at 654 (citations omitted).

With due respect for Aristotle's injunction which constricts the majority, I take the law from the Supreme Court. But perhaps we should recall that Aristotle also said: "by nature some are free, others slaves," *Politics* 1254b32, and "the best state will not make the mechanic a citizen." *Politics* 1277b33. Personally, I prefer the familiar maxim that "all men are created equal." It seems likely that the latter sentiment, rather than the Aristotlean one, imbued the intent of Congress when section 1981 was enacted.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3445

JEETENDRA BHANDARI,

Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF COMMERCE

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(January 29, 1987)

Before GEE and HILL, Circuit Judges, and HUNTER,* District Judge. GEE, Circuit Judge:

Appellant Jeetendra Bhandari sued appellee First National Bank of Commerce after First National declined to issue him a credit card. First National refused Bhandari credit in part because he was not a citizen of the United States. The district court held that neither 42 U.S.C. § 1981 nor the Equal Credit Opportunity Act ("ECOA") gave Bhandari a legal remedy for private alienage discrimination. The court determined, however, that First National had violated the ECOA by not telling Bhandari all its reasons for denying him credit. The court awarded damages, costs, and attorneys' fees. Bhandari appeals, contending

*District Judge of the Western District of Louisiana, sitting by designation.

that the district court erred in various respects. We hold that the law of this Circuit recognizes actions for private alienage discrimination under § 1981, but that alienage discrimination is not actionable under the ECOA. Accordingly, we affirm in part, reverse in part, and remand.

I

Bhandari is a citizen of India and a lawful permanent resident of the United States. In October 1983, Bhandari was employed as an accountant. He applied to First Bankcard Center, an instrumentality of First National, for unsecured revolving consumer credit in the form of a Visa or Master Card credit card. The application included the question "Are you a U.S. citizen?" Bhandari answered "No."

The application was reviewed by a credit analyst. First National used a "judgmental" credit evaluation system. It established certain guidelines and allowed its credit analysts to use their judgment in applying those guidelines to the facts presented by each application. At the time Bhandari's application was processed, one of First National's credit policy "guidelines" was: "Applicant must be a U.S. citizen unless application is approved by an officer of the Bank." The district court found that the analyst who reviewed Bhandari's application denied it for two reasons: his alienage and his short time of employment in his then-current job. First National sent Bhandari a letter stating only that he was denied credit because he was not a U.S. citizen.

Bhandari wrote First National to inquire about the Bank's policies. A credit clerk called Bhandari in re-

sponse to his letter. Bhandari asked the clerk if it was First National's policy to deny credit cards to non-citizens. In an ill-considered attempt to fob off Bhandari with an authoritative answer, the clerk briefly put him on hold, then falsely stated that she had checked with her supervisor, who had confirmed that First National did not issue credit cards to non-citizens.

Bhandari retained an attorney. In February 1984, his attorney discussed the denial of his application with John Richardson, support services manager of First Bankcard Center. Richardson apparently was disturbed to learn that one of his credit analysts had used an applicant's non-citizenship as the sole reason for denial of credit. He felt that the "guideline" was only one factor, and that the factor had been given greater weight than it deserved.[1] Richardson told Bhandari's attorney that if Bhandari's lack of U.S. citizenship was the only reason he had been denied a credit card, First National would correct the situation by issuing a card with an apology. When Bhandari's attorney said his client would also have to recover attorneys' fees,

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1. Richardson was the author of the disputed "guideline". In his deposition testimony, he attributed a completely idiosyncratic meaning to it. Richardson testified that by "Applicant must be a U.S. citizen unless application is approved by an officer of the Bank," he meant to convey to credit analysts that they had the authority to approve credit for aliens, but that they were required to receive the approval of a bank officer for *denying* credit on the basis of non-citizenship! This explains Richardson's apparently genuine (if entirely unreasonable) surprise that an alien had been denied credit on the basis of the "guideline".

Richardson subsequently changed the "guideline" to read: "Applicant must be a U.S. citizen or demonstrate status of legal permanent resident, or application must be approved by an officer of the Bank."

Richardson said he would have to discuss the matter with the Bank's attorneys.

Bhandari's attorney then wrote to counsel for First National offering to settle the case. The letter stated that Bhandari "has obtained Visa and Master Card credit elsewhere and is not interested in opening a new account with First Bankcard Center. In general, his primary concern is that the policy be changed for future applicants, and that some publicity be given to this result." The letter stated that Bhandari would settle if First National (1) changed its policies and practices of treating legal resident aliens differently from citizens, (2) changed its application forms to reflect this change in policy, (3) requested in writing immigration status information from all non-citizen applicants who later turned in the old application forms still in circulation, (4) "explicitly authorized" Bhandari and his attorney to represent to various United States organizations and newspapers related to immigration and Indian affairs that First National's policy was changed due to their efforts, and (5) paid Bhandari $1500 in attorneys' fees for his legal costs to that point. First National rejected this offer.

Bhandari filed suit alleging that First National's denial of credit was discrimination against him on the basis of his alienage and his national origin, in violation of both the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91f, and 42 U.S.C. § 1981. After discovery, he amended his complaint to add the allegation that First National had failed to inform him fully of the reasons for the adverse action on his credit application in violation of a provision

of the ECOA, 15 U.S.C. § 1691(d).[2] Bhandari requested actual and punitive damages and declaratory and injunctive relief for all his claims. He also sought attorneys' fees under 15 U.S.C. § 1691e(d) and 42 U.S.C. § 1988. The parties submitted the case to the district court on stipulations, depositions, memoranda, and exhibits; no live testimony was offered.

The district court held that Bhandari's claims for injunctive and declaratory relief were moot because First National had voluntarily changed its policy and Bhandari had offered no evidence that First National was persisting in the challenged practices. The court found no factual basis for Bhandari's claim that he was discriminated against on the basis of his national origin in violation of the ECOA, 15 U.S.C. § 1691(a).[3] The court found that First National discriminated against Bhandari on the basis of his alienage. The court held, however, that neither the ECOA or § 1981 provide a cause of action to redress private alienage discrimination. The district court noted that *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), was directly contrary to its conclusion that § 1981 does not reach private alienage discrimination, but held that *Guerra* was no longer good law.

The district court determined that First National violated the notice provisions of the ECOA, 15 U.S.C. §1691 (d), which require the lender to furnish to the applicant

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2. Bhandari alleged in his amended complaint that he was discriminated against on the basis of his race or color in violation of § 1981, but abandoned this theory before trial.

3. The district court also held that § 1981 does not prohibit discrimination based on national origin. Bhandari does not appeal this determination.

a complete list of specific reasons for "adverse action." The court noted that "In their zeal to avoid the appearance of any discriminatory acts or practices, those [First National's] witnesses established additional reasons other than plaintiff's citizenship for denial of credit." Memorandum opinion ("Op.") at 10. The court awarded Bhandari attorneys' fees of $1500 under 15 U.S.C. §1691e(d). Finally, the court "taxed" the total costs of the depositions used in lieu of live testimony equally to both parties, and ordered the defendant to pay all other costs.

II

In *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir.1974), a panel of this court held that § 1981 prohibits private discrimination based on alienage. The plaintiff in that case was a Mexican national who was demoted under a policy of his employer and his union that gave certain preferred jobs to United States citizens. The court began by noting that § 1981 was derived in part from the § 1 of the Civil Rights Act of 1866, which was addressed only to racial discrimination. 498 F.2d at 653 (citing *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1189 (1968)). The court pointed out, however, that in § 16 of the Voting Rights Act of 1870 the language of § 1 of the 1866 Act was modified to give aliens the *same* list of rights (except real property rights now found in § 1982) as those enumerated in § 1 of the 1866 Act. The court noted that § 1981 had been interpreted to prohibit private racial discrimination, citing *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir.1970), *cert. denied*, 401 U.S. 948, 91

S.Ct. 935, 28 L.Ed.2d 321 (1971).[4] From these premises, the court drew the logical conclusion that the language of § 16 of the 1870 Act, now found almost verbatim in § 1981, should reach private alienage discrimination as well.

Only two published decisions have since carefully considered the problem posed and answered in *Guerra*. In *Espinoza v. Hillwood Square Mutual Ass'n*, 522 F.Supp. 559 (E.D.Va.1981), the court followed the syllogism of *Guerra*. Section 16 of the 1870 Act was intended to protect aliens from alienage discrimination to the same extent that § 1 of the 1866 Act protected citizens from racial discrimination. Section 1 prohibits private racial discrimination. Therefore, § 16 prohibits private alienage discrimination. 522 F.Supp. at 564.

De Malherbe v. Int'l Union of Elevator Constructors, 438 F.Supp. 1121 (N.D.Cal. 1977), reached the opposite conclusion. The court adopted a different argument. Section 1 of the 1866 Act may reach private discrimination. The authors of § 16 of the 1870 Act, however, did not realize that. The legislative history of § 16 shows beyond a doubt that the sponsors of the legislation meant only to prohibit alienage discrimination under color of state law. The fact that § 1 and § 16 were merged in § 1981 cannot magically infuse § 16 with a purpose that never entered the minds of those in Congress who sponsored it and voted

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4. The holding of *Sanders* was subsequently approved in *Johnson v. Railway Express Agency*, 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975). *Johnson held that the* statute of limitations for actions under § 1981 was not tolled by proceedings before the Equal Employment Opportunity Commission under the Civil Rights Act of 1964; *Johnson* tacitly overruled part of *Guerra* that had ruled to the contrary. See *Williams v. Phil Rich Fan Mfg.*, 552 F.2d 596, 597 (5th Cir. 1977).

for it. Therefore, § 1981 does not reach private alienage discrimination. 438 F.Supp. at 1140.

Both arguments are entirely plausible. We must consider the history of § 1981 and the Supreme Court's authoritative interpretations of it to determine which is correct.

A

Title 42 U.S.C. § 1981 is a simple statute that has been interpreted in extraordinarily complex ways. The statute reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On its face, the statute simply gives to all persons the right to be treated equally under the law, or, more accurately, the right to be treated as well as "white citizens." For better or worse, however, the statute has not received such a simple reading.

Although long viewed as reaching state action only,[5] the statute more recently has been interpreted to prohibit

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5. *See, e.g., Hurd v. Hodge*, 334 U.S. 24, 31, 68 S.Ct. 847, 851, 92 L.Ed. 1187 (1948) (judicial enforcement of restrictive covenants prohibited by § 1982; the statute is directed toward governmental action); *Corrigan v. Buckley*, 271 U.S. 323, 330-31, 46 S.Ct. 521, 524, 70 L.Ed. 969 (1926) (restrictive covenants do not involve state action and therefore do not violate the constitution or the Civil Rights Act); *Civil Rights Cases*, 109 U.S. 3, 16, 3 S.Ct. 18, 24, 27 L.Ed. 835 (1883) (1866 Act directed to state action).

private racial[6] discrimination in various forms of contracting,[7] despite the fact that only one phrase and perhaps only one word in the entire statute ("*make* and enforce contracts") can even arguably be read to reach beyond notions of legal capacity and equal treatment under law. Some courts have concluded that *only* this phrase in the entire statute reaches private conduct,[8] while others have interpreted the statute more expansively to allow actions for private violations of other clauses.[9] At least in the context of private acts, § 1981 has been read to prohibit only intentional discrimination.[10]

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6. The vast majority of courts that have considered claims of national origin, religion, or sex-based discrimination have rejected them. *See* 2 J. Cook & J. Sobieski, *Civil Rights Actions* ¶5.08 (1986) (collecting cases). There is considerable confusion, however, about the proper definition of "race" (and its relation to national origin) for § 1981 purposes. The Supreme Court appears to be ready to address this problem. *See Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 517 (3d Cir.) (ethnic Arab can assert a claim for "racial" discrimination under § 1981), *cert. granted*, — U.S. —, 107 S.Ct. 62, 93 L.Ed.2d 21 (1986); *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 527 (4th Cir.) (discrimination against Jews not racial discrimination under § 1981), *cert. granted*, — U.S. —, 107 S.Ct. 62, 93 L.Ed.2d 21 (1986); *see also Alizadeh v. Safeway Stores*, 802 F.2d 111, 115 (5th Cir. 1986) (following *Al-Khazraji*).

7. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (publicly-offered education at private nonsectarian schools); *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (employment contracts).

8. *See Shaare Tefila Congregation v. Cobb*, 785 F.2d at 526; *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3d Cir. 1977), *cert. denied sub nom. City of Pittsburgh v. Mahone*, 438 U.S. 904, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978).

9. *See, e.g., Pennsylvania v. Local 542, I.U.O.E.*, 347 F.Supp. 268, 288 (E.D.Pa.1972) ("to sue, to be parties, give evidence" clause).

10. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

Several Supreme Court cases have established that aliens are "persons" within the meaning of the statute,[11] but these cases do not illuminate the basis and scope of § 1981's protections.[12] An astonishing number of cases

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11. *See Graham v. Richardson*, 403 U.S. 365, 377, 91 S.Ct. 1848, 1855, 29 L.Ed.2d 534 (1971); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419-20, 68 S.Ct. 1138, 1142-43, 92 L.Ed. 1478 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886).

12. In *Graham v. Richardson*, the Court invalidated state restrictions on the availability of welfare benefits to aliens on the grounds that the restrictions violated the equal protection clause of the fourteenth amendment. The Court also held, in the alternative, that the restrictions were preempted by conflicting federal policy. Section 1981 was cited as evidence of Congress' liberal treatment of aliens under its plenary authority to regulate immigration. 403 U.S. at 377-78, 91 S.Ct. at 1855.

In *Takahashi*, the Supreme Court invalidated a California law denying fishing licenses to persons ineligible for citizenship under federal law. The law was clearly aimed at Japanese residents who were then the only significant alien group in the state ineligible for citizenship. The rationale of the decision is far from clear, but the Court seems to invalidate the law as an unreasonable classification in violation of the equal protection clause of the fourteenth amendment. *See Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). California tried to justify the reasonableness of the classification on the grounds that it simply mirrored the federal classification that made the Japanese ineligible for citizenship in the first place. The Court rejected the argument's analogy by distinguishing the federal government's broad constitutional powers over immigration, but also tried to undermine the analogy by pointing to § 1981 as evidence of federal policy to the contrary. 334 U.S. at 419-20, 68 S.Ct. at 1142-43.

In *Yick Wo*, the Court reviewed a San Francisco ordinance purporting to regulate the use of wooden buildings for commercial laundry facilities. The regulation permitted exceptions to be made by the city Board of Supervisors. The Supervisors had granted exceptions to 80 white citizens and denied exceptions to 200 Chinese aliens. No white citizen had been

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opine in dicta that § 1981 prohibits alienage discrimination, usually in contexts in which no state action is present;[13] actual holdings on the subject are rare, however. As

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denied and no Chinese alien granted an exception. The Court noted that the fourteenth amendment applies to aliens and held that the regulation was unconstitutional under the equal protection clause. Section 1977 of the Revised Statutes (now § 1981) was recited as a statutory implementation of the fourteenth amendment. 118 U.S. at 369, 6 S.Ct. at 1070, 30 L.Ed. at 226.

These cases make clear that § 1981 somehow applies to aliens, but all three cases involve state action invalidated under the equal protection clause and none involves liability directly under § 1981. They do not even hint at the basis and scope of liability under that section. At a minimum, however, the cases must be read to allow aliens a cause of action under § 1981 for *racial* discrimination on the same footing as citizens. *Cf. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F.Supp. 993 (S.D.Tex. 1981) (substantial likelihood of success on merits of § 1981 claim by Vietnamese aliens for private discrimination; court cites *Guerra* but is ambiguous about whether racial or alienage discrimination is basis of claim).

13. Aside from the Fifth Circuit, where such dicta is understandable given *Guerra*, see *St. Louis v. Alverno College*, 744 F.2d 1314, 1317 (7th Cir.1984); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1259 (7th Cir.1984); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir.1977); *Davey v. Tomlinson*, 627 F.Supp. 1458, 1462 (E.D.Mich.1986); *Bates v. Carborundum Co.*, 623 F.Supp. 613, 620 (N.D.Ind.1985); *Quinn v. Kent General Hosp., Inc.*, 617 F.Supp. 1226, 1232 (D.Del.1985); *Bell v. Brennan*, 570 F.Supp. 1116, 1118 (E.D.Pa.1983); *Carrillo v. Illinois Bell Telephone Co.*, 538 F.Supp. 793, 795 (N.D.Ill. 1982); *Bell v. City of Milwaukee*, 536 F.Supp. 462, 474 (E.D. Wis.1982) *aff'd in part, vacated in part, rev'd in part*, 746 F.2d 1205 (7th Cir.1984); *Aponte v. National Steel Service Ctr.*, 500 F.Supp. 198, 202 (N.D.Ill.1980); *German v. Killeen*, 495 F.Supp. 822, 827 (E.D.Mich.1980); *University of Missouri Nat'l Education Ass'n v. Dalton*, 456 F.Supp. 985, 995 (W.D.Mo.1978); *Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 80 F.R.D. 254, 263 (N.D.Ill.1978); *LaFore v. Emblem Tape & Label Co.*, 448

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we have noted, a few courts have held that the statute prohibits private alienage discrimination,[14] while others have concluded that the statute prohibits only private discrimination on the basis of race, while prohibiting alienage-based discrimination involving state action.[15] One court

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F.Supp. 824, 825 (D.Colo.1978); *Ortega v. Merit Ins. Co.*, 433 F.Supp. 135, 138 (N.D.Ill.1977); *Cubas v. Rapid American Corp.*, 420 F.Supp. 663, 665 (E.D.Pa.1976); *Holton v. Crozer-Chester Medical Center*, 419 F.Supp. 334, 336 (E.D.Pa.1976); *vacated and remanded*, 560 F.2d 575 (3d Cir. 1977); *Harbert v. Rapp*, 415 F.Supp. 83, 86 (W.D.Okla.1976); *Jones v. United Gas Importing Corp.*, 68 F.R.D. 1, 13 (E.D.Pa.1975); *Troy v. Shell Oil Co.*, 378 F.Supp. 1042, 1046 (E.D.Mich.1974).

14. *See Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir.1974), *aff'g* 350 F.Supp. 529 (S.D.Tex.1972); *Espinoza v. Hillwood Square Mutual Ass'n*, 522 F.Supp. 559 (E.D.Va. 1981). Several other cases can be read to support a claim for private alienage discrimination, but do not squarely hold that such a claim is possible. *See Abdulrahim v. Gene B. Glick Co.*, 612 F.Supp. 256, 262 (N.D.Ind.1985) (plaintiff subject to national-origin slurs argued alienage-based discrimination; court rejected factual claim, while seeming to assume that the allegations, if true, would state a claim under § 1981); *Sud v. Import Motors Limited*, 379 F.Supp. 1064, 1072 (W.D.Mich.1974) (§ 1981 prohibits private alienage and national origin discrimination).

15. *See Ben-Yakir v. Gaylinn Associates, Inc.*, 535 F.Supp. 543 (S.D.N.Y.1982); *De Melherbe v. Int'l Union of Elevator Constructors*, 438 F.Supp. 1121 (N.D.Cal.1977); *cf. Rios v. Marshall*, 530 F.Supp. 351, 361 & n. 9 (S.D.N.Y.1981) (rejecting "reverse alienage discrimination" claim and misreading *Guerra* as merely extending § 1981's protections against private racial discrimination to aliens).

There are only a few cases that seem to turn on § 1981 claims involving state action and alienage. We assume that the availability of § 1983/equal protection claims in many such circumstances explains the paucity of cases. *See Morrisson v. Jones*, 607 F.2d 1269 (9th Cir. 1979) (suit by resident alien under 1981 and 1983 against county officials; reversing

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has recently accepted[16] and one rejected[17] claims by white citizens of "reverse" alienage discrimination. In the context of state action, the interaction between the statute and the equal protection clause of the fourteenth amendment has not even been addressed.[18]

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dismissal by lower court based on qualified immunity of defendants), *cert. denied*, 445 U.S. 962, 100 S.Ct. 1648, 64 L.Ed.2d 237 (1980); *Inada v. Sullivan*, 523 F.2d 485, 489 (7th Cir.1975) (Japanese alien threatened by police officer with deportation for pursuing remedies for an allegedly illegal arrest; held: plaintiff may have an action for interference with rights to use courts and petition government; those rights "guaranteed to Inada by federal statute 42 U.S.C. § 1981"); *Banerjee v. Roberts*, 641 F.Supp. 1093, 1104 (D.Conn.1986) (plaintiff alien survives summary judgment on, among other things, a claim under 1981 against state university hospital for intentional discrimination); *Rodriguez v. Steirheim*, 465 F.Supp. 1191 (S.D. Fla.1979) (action under both § 1981 and § 1983/equal protection based on alienage assumed to lie against state officials), *aff'd mem.*, 609 F.2d 1007 (5th Cir.1980).

16. *See Thomas v. Rohner-Gehrig & Co.*, 582 F.Supp. 669, 672-73 (N.D.Ill.1984) (granting white citizens leave to amend complaint to allege "reverse alienage discrimination" under § 1981).

17. *See Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 762 (5th Cir.1986).

18. Although state classifications involving alienage are subject to strict scrutiny under the fourteenth amendment, *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), the Supreme Court has established that states may constitutionally restrict certain classes of state employment to citizens. *See, e.g., Cabell v. Chevez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677 (1982) (county probation officers); *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (school teachers); *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) (state troopers). Section 1981 makes alienage discrimination by the states illegal, and there is no hint in the statute of any exceptions along the lines of the exceptions to strict scrutiny developed by the Supreme Court. *Cf. Chavez-Salido v. Cabell*, 427 F.Supp. 158,

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One reason for all this confusion is that the Supreme Court has held that § 1981 was derived from both § 1 of the Civil Rights Act of 1866 and § 16 of the Voting Rights Act of 1870. *See Runyon v. McCrary*, 427 U.S. 160, 168 & n. 8, 96 S.Ct. 2586, 2593-94 & n. 8, 49 L.Ed.2d 415 (1976). The 1866 Act by its terms applies only to citizens, but § 16 of the 1870 Act applies to "all persons."

Congress enacted the Civil Rights Act of 1866 soon after the ratification of the thirteenth amendment. "The principal object of the legislation was to eradicate the

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162 (C.D. Cal.1977) (three judge court) (holding that aliens have § 1983/equal protection claim but noting § 1981 alienage discrimination claim and citing, inter alia, *Guerra* for proposition that "§ 1981 applies to discrimination in employment based on alienage as well as to employment discrimination which is racially based"), *vacated sub nom. County of Los Angeles v. Chavez-Calido*, 436 U.S. 901, 98 S.Ct. 2228, 56 L.Ed.2d 398 (1978), *on remand, Chavez-Salido v. Cabell*, 490 F.Supp. 984 (C.D.Cal.1980) (three judge court) (affirming prior judgment), *rev'd on other grounds*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677 (1982); *Dougall v. Surgarman*, 339 F.Supp. 906, 911 (S.D.N.Y.1971) (three judge court) (Lumbard, J., concurring) (challenged statute not only violates equal protection but also violates § 1981), *aff'd on other grounds*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973).

To the authors of § 1981, of course, the apparent conflict between the unequivocal words of the statute and the equivocal judicially-created equal protection doctrine would not have existed. The statute was passed during the conceptual heyday of the rights-privileges distinction. It would have stunned members of Congress in 1870 to learn that § 16 of the 1870 Act might give aliens a right to be employed by a state in any capacity. State employment is clearly a privilege. It can be denied altogether, and thus permitted on any grounds; the greater power includes the lesser. But the rights-privileges distinction has been rejected by modern legal minds. *See, e.g., Graham v. Richardson*, 403 U.S. at 374, 91 S.Ct. at 1853. Thus, we must state that we express no opinion about this apparent conflict between § 1981 and equal protection doctrine.

Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386, 102 S.Ct. 3141, 3148, 73 L.E.2d 835 (1982) The 1866 Act declared most persons born in the United States to be citizens, and gave all citizens a wide range of enumerated rights to the extent enjoyed by "white citizens." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.[19] The Act made certain deprivations of those rights a federal crime, *id.* at § 2,[20] gave to federal district courts original jurisdiction

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19. Section 1 of the act reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary not withstanding.

Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27.

20. Section 2 of the act reads:

> Sec. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary

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of civil and criminal actions related to the Act, *id.* at § 3, provided elaborate instructions on the rights and duties of federal officers in the enforcement of the Act, *id.* at §§ 4, 5, and 7, made interference with enforcement a crime, *id.* at § 6, gave the President special powers to enforce the Act, including the use of the military, *id.* at §§ 8 and 9, and gave a right of appeal to the Supreme Court in "causes under the provisions of this act . . .," *id.* at § 10.

The Voting Rights Act of 1870 focused on establishing the voting rights of all citizens. Congress, however, tacked on three unrelated sections. Section 16 gave "all persons" in the United States the same list of rights given only to citizens in § 1 of the 1866 Act, except those rights related to the ownership and conveyance of property. Act of May 31, 1870, ch. 114, 16 Stat. 140, 144.[21] It also forbade dis-

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servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27.

21. Sec. 16. *And be it further enacted,* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary not withstanding. No tax or charge shall be imposed on enforced by any State upon any person immigrating thereto from a foreign coun-

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criminatory taxes on immigrants. *Id.* Section 17 made violations of § 16 a crime,[22] and § 18 re-enacted the 1866 Act and made §§ 16 and 17 enforceable according to the provisions of the earlier act. *Id.*[23]

The 1870 Act was intended to extend many of the protections of the 1866 Act to aliens. This is clear from the language, structure, and history of the statute. First, the change from "citizens" in § 1 of 1866 Act to "all persons" in § 16 of the 1870 Act shows that aliens are protected by the later statute. Also, § 16 mirrors § 1 but adds an entirely new sentence: it prohibits discriminatory state

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try which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144.

22. Sec. 17. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizen, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Act of May 31, 1870, ch. 114, § 17, 16 Stat. 140, 144.

23. Sec. 18. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Act of May 31, 1870, ch. 114 § 18, 16 Stat. 140, 144.

taxes against immigrants from foreign countries.[24] Section 17 tracks the language of § 2 of the 1866 Act making deprivations of secured rights a crime, except that it adds the phrase "on account of such person being an alien" to the earlier phrase "by reason of his color or race" in defining the reach of liability and describing the protected class.[25]

Second, § 16 omits the phrase "to inherit, purchase, lease, sell, hold, and convey real and personal property" found in § 1 of the 1866 Act. Before and after the 1870 Act, the states imposed significant restrictions on the ownership or control of real property by aliens. *See Takahashi v. Fish and Game Commission*, 334 U.S. 410, 422, 68 S.Ct. 1138, 1144, 92 L.Ed. 1478 (1948) (citing cases sustaining restrictions); *Truax v. Raich*, 239 U.S. 33, 40, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (same). Thus, the omission of certain rights found in § 1 of the 1866 Act shows that § 16 was designed to protect aliens.[26] It also shows

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24. *See supra* note 21.

25. *See supra* notes 20 (§ 2) and 22 (§ 17).

26. In a discussion in the Senate of S.365, which later became §§ 16, 17, and 18 of the 1870 Act (discussed below), Senator Pomeroy asked S.365's sponsor Senator Stewart about the exact effect of the bill:

> Mr. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada [Senator Stewart] a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?
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> Mr. STEWART. No; it gives all the protection of laws. If the Senator will examine this bill in connection with the original civil rights bill [the 1866 Act], he will see that it has no reference to inheriting or holding real estate.

Cong.Globe, 41st Cong., 2d Sess. 1536 (1870).

that the 1870 Act was designed to prohibit certain *alienage-based* discriminations, and not simply to make aliens eligible to assert racial discrimination claims.

Finally, the legislative history is clear. Sections 16, 17, and 18 of the 1870 Act first appeared on January 10, 1870, as S.365, "a bill to secure to all persons the equal protection of the laws. . . ." Cong.Globe, 41st Cong., 2d Sess. 323 (1870). Senator Stewart of Nevada, the bill's sponsor, later described the relationship between S.365 and the 1866 Act:

> The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens. . . . It extends the operation of the civil rights bill . . . to all persons within the jurisdiction of the United States.

Cong.Globe at 1536. Again, the point of the bill was not merely to bring aliens into the class of persons who could assert racial discrimination claims; it was meant to protect aliens of any race from alienage discrimination. Senator Stewart stated that:

> I would be less than man if I did not insist . . . that we will protect Chinese aliens *or any other aliens whom we allow to come here*, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are.

Id. at 3658 (emphasis added).

Thus at the end of 1870, federal law contained two similar provisions. One gave citizens certain rights, the other gave all persons a subset of those rights. The two

statutes had distinct purposes and distinct histories. But things did not remain so simple.

Codifiers of the federal statutes were appointed pursuant to the Act of June 27, 1866, ch. 140, 14 Stat. 74, reenacted by Act of May 4, 1870, ch. 72, 16 Stat. 96, "to revise, simplify, arrange, and consolidate all statutes of the United States. . . ." § 1, 14 Stat. at 74. Congress commanded them to "bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text. . . ." § 2, 14 Stat. at 75.

The codifiers confronted the overlapping civil rights statutes. The 1870 Act gave "all persons" certain rights; the 1866 Act protected only citizens but gave a broader range of rights. Section 16 appeared to subsume all but the property-rights aspect of § 1, since the language was closely parallel and the class of persons protected was a superset of the class protected by § 1. The Revisers' solution was to carve out the property rights given to citizens only, to put these in § 1978 of the Revised Statutes (now § 1982),[27] and to put part of § 16 of the 1870 Act in § 1977 of the Revised Statutes (now § 1981). Thus, § 1982 is a

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27. Section 1982 now reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

fragment of § 1 of the 1866 Act, while § 1981 is an amalgam of part of § 1 and most of § 16 of the 1870 Act.

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These statutes lay dormant for a hundred years, until the Supreme Court called up the fragment of § 1 of the 1866 Act found in § 1982.[28] In *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Court held that § 1982 prohibited private discrimination on the basis of race in the sale of real estate. Recognizing the common origin of § 1982 and § 1981, the courts of appeals quickly extended the reasoning of *Jones* to prohibit private employment discrimination on the basis of race. *See, e.g., Sanders v. Dobbs Houses, Inc.*, 431 F.2d at 1100. The Supreme Court gave its benediction to these cases in *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 n. 6, 95 S.Ct. 1716, 1720 n. 6, 44 L.Ed.2d 295 (1975), but did not independently explore § 1981 and private discrimination until *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). In *Runyon*, the Court held that a privately-owned school was prohibited by § 1981 from denying admission to prospective students on the

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28. Because the 1866 Act and the 1870 Act were thought to reach only state action, they were overshadowed by the equal protection clause of the fourteenth amendment. The fourteenth amendment was and is the primary instrument of judicial supervision of the states. The 1866 Act, however, was briefly awakened in *Hurd v. Hodge*, 334 U.S. 24, 31, 68 S.Ct. 847, 851, 92 L.Ed. 1187 (1948), a companion case of *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). *Hurd v. Hodge* invalidated the judicial enforcement of restrictive covenants in the District of Columbia, in part on the basis of § 1982. The fourteenth amendment did not apply, of course, and the Court was not yet willing to read a federal equal protection clause into the fifth amendment.

basis of race. 427 U.S. at 167-68, 96 S.Ct. at 2593. *Jones*, of course, relied on § 1 of the 1866 Act from which § 1982 derived. *Runyon* extended the holding of *Jones* to § 1981 by concluding that § 1981 derives in part from § 1 of the 1866 Act, but *Runyon* relied entirely on the analysis of *Jones* for the underlying proposition that § 1 reaches private racial discrimination. We must examine *Jones* to see if its reasoning supports *Guerra's* interpretation § 16 of the 1870 Act.

The Supreme Court advances three arguments in *Jones* to establish that § 1 of the 1866 Act reaches private discrimination. First, the Court argues that:

> In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, "the same right" to purchase and lease property "as is enjoyed by white citizens." As the Court of Appeals in this case evidently recognized, that right can be impaired as effectively by "those who place property on the market" as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial grounds, the fact remains that, whenever property "is placed on the market for whites only, whites have a right denied to Negroes."

392 U.S. at 420-21, 88 S.Ct. at 2193 (footnotes omitted). This argument applies with equal force to § 16 of the 1870 Act which uses identical language.[29]

But, while constrained to respect the argument by its source, the force of it escapes us: no white citizen had in 1866 (or has today) a right to purchase a house from

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29. *See supra* note 21.

anybody.[30] Indeed, in 1866 he did not even have a legally enforceable claim—a "right"—not to have his offer to purchase refused on any idoiosyncratic ground whatsoever, including that the seller disliked having business dealings with whites. The first *Jones* argument does not persuade us that the 1870 Act bans private discrimination against aliens.

The Court's second argument is based on the structure of § 1 and § 2. Section 1 grants certain rights. Section 2 reads in part:

> [A]ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor . . .

14 Stat. at 27. The Supreme Court read the criminal provisions of § 2 as limited in an important way.

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30. Whites had at the time when § 1981 was first enacted, and have (with a few exceptions mentioned below) no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract. Indeed it is and always has been central to the very concept of a "contract" that there be "assent by the parties who form the contract to the terms thereof," Restatement of Contracts § 19(b) (1932); *see also* 1 S. Williston, Law of Contracts § 18(3) (3 ed., 1957). The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as it enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract.

Runyon, 427 U.S. at 194, 96 S.Ct. at 2606 (White, J., dissenting).

> Indeed, if § 1 had been intended to grant nothing more than an immunity from *governmental* interference, then much of § 2 would have made no sense at all. For that section, which provided fines and prison terms for certain individuals who deprived others of rights "secured or protected" by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed. There would, of course, have been no private violations to exempt if the only "right" granted by § 1 had been a right to be free of discrimination by public officials. Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under §2.

392 U.S. at 425-26, 88 S.Ct. at 2195-96 (emphasis in original) (footnotes omitted). Again, this argument applies equally to § 16 and § 17 of the 1870 Act; they have precisely the same relationship and their relevant language is almost identical.[31]

There are two problems with this argument. First, § 2 can just as easily be read as "carefully drafted to enforce all of the rights secured by § 1." *Jones*, 392 U.S. at 454, 88 S.Ct. at 2211 (Harlen, J., dissenting).[32] After all, § 1 also contains "color of law" language:

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31. *See Espinoza v. Hillwood Square Mutual Ass'n*, 522 F.Supp. at 564 (relying in part on this argument in holding that § 1981 reaches private alienage discrimination).

32. The editors of Statutes at Large, contemporaries and subordinates of Congress, read the criminal provisions of the

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> [C]itizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, *any law, statute, ordinance, regulation, or custom, to the contrary not withstanding.*

14 Stat. at 27 (emphasis added). The *Jones* Court simply asserts without argument that the "color of law" clause of § 1 modifies only the immediately preceding "punishments, pains, and penalties" clause, 392 U.S. at 422 n. 29, 88 S.Ct. at 2194 n. 29, but the clause can at least as easily be read as referring to the entire section.

Second, even if § 2 was crafted narrowly to exclude from criminal sanctions private acts depriving persons of § 1 rights, that does not mean that § 1 was designed to reach private discrimination.

> Private interference with a right secured against the states is entirely possible. . . . Without the qualifying clause in § 17 of the 1870 Act, that section could be interpreted as imposing criminal sanctions on private parties who prevented or hindered aliens from exercising rights which were secured against state interference by § 16.

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1866 Act and the 1870 Act this way. Section 2 of the 1866 Act is annotated: "Penalty for depriving any person of any right protected by this act. . . ." 14 Stat. at 27. Section 17 of the 1870 Act is annotated: "Penalty for violation of provisions of preceding section." 16 Stat. at 144.

De Malherbe, 438 F.Supp. at 1141. This distinction was meaningful to lawmakers of that era. For example, *Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed.2d 338 (1971), held that the plain language of part of § 2 of the Civil Rights Act of 1871, now 42 U.S.C. § 1985(3), provided a remedy for deprivations by private conspiracies of equal protection of the laws. The Court noted:

> A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.

403 U.S. at 97, 91 S.Ct. at 1796. Without the "color of law" phrase, § 2 of the 1866 Act and § 17 of the 1870 Act could have become a font of federal criminal law. Any assault and battery that injured someone sufficiently to prevent him from testifying in a legal proceeding would have been a federal crime; the attacker had "subjected" the victim to a "deprivation" of the right to "give evidence." Thus, Mr. Wilson of Iowa, Chairman of the House Judiciary Committee, in response to a question about the "color of law" clause in § 2 of the 1866 Act, said that the Committee did not want to make "a general criminal code for the States." Cong.Glob, 39th Cong. 1st Sess., 1120 (1866). The Supreme Court's structural argument based on the "color of law" phrase in the criminal section of the statute is weak; without more, it is not enough to persuade us that § 16 of the 1870 Act was intended to reach private discrimination.

The Supreme Court's last and strongest argument in *Jones* rests on the legislative history of the 1866 Act.

It is clear that the Congress was concerned with the devastating effects of private discrimination on newly emancipated blacks.

> The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.

392 U.S. at 427-28, 88 S.Ct. at 2197 (footnotes omitted). The *Jones* Court assembles an impressive array of evidence in the history of the 1866 Act that Congress meant to root out all the badges and incidents of slavery, including those resulting from purely private animosity. *See* 392 U.S. at 422-37, 88 S.Ct. at 2194-202. Of course, the customary glaring inconsistencies of legislative histories are present in this one, and Justice Harlan in dissent compiles a great deal of persuasive evidence directly to the contrary. *See* 392 U.S. at 454-73, 88 S.Ct. at 2211-20.[33] Nevertheless, the history of the 1866 Act leaves us with the strong impression that many members of Congress, at least, wanted to eradicate racist practices beyond those the language of the statute appears to reach. If the his-

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33. It is worth noting that both Justice Powell and Justice Stevens, who concurred in the majority opinion in *Runyon*, agreed with Justice White and Chief Justice Rehnquist in dissent that *Jones* was wrongly decided, and that § 1 of the 1866 Act was not intended to reach private discrimination. *Runyon*, 427 U.S. at 186, 189, 96 S.Ct. at 2602, 2603. Justices Powell and Stevens disagreed with the dissenters, however, that *Jones* could be distinguished and they declined to vote to overrule it.

tory of the 1870 Act were similar, *Guerra* could be justified as a perfect analogue of *Jones*.

But the history of the 1870 Act is completely different. It leaves no doubt that Congress was concerned with legal discriminations against aliens by the states alone. The legislative process culminating in § 16 began with a resolution proposed by Senator Stewart and unanimously approved by the Senate on December 6, 1869:

> *Resolved*, That the Committee on the Judiciary be requested to inquire if any States are denying to any class of persons within their jurisdiction the equal protection of the law, in violation of treaty obligations with foreign nations and of *section one of the fourteenth amendment* to the Constitution; and if so, what legislation is necessary to enforce such treaty obligations and such amendment, and to report by bill or otherwise.

Cong. Globe, 41st Cong., 2d Sess. 3 (1869) (emphasis added).

On January 10, 1870, Senator Stewart introduced S.365 as the fruition of the December 6 resolution.[34] Cong.

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34. S.365 was eventually incorporated into the 1870 Act. See remarks of Sen. Trumbell, Cong. Globe at 4307. Its language was almost identical to §§ 16, 17, and 18 of the 1870 Act:

> *Be it enacted, & c.*, That all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance,

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Globe at 323. He later described the relationship between the 1866 Act and S.365:

> The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have equal protection of our laws. It extends the operation of the civil

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regulation, or custom to the contrary not withstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.

Sec. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding $1,000 or imprisonment not exceeding one year, or both, in the discretion of the court.

Sec. 3. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reenacted, and said act, except the first and second sections thereof, is hereby referred to and made a part of this act.

Cong.Globe at 1536. There are only three material differences: the "Indian" clause in the first section was dropped; the phrase "white persons" in the second section was changed to "citizens"; and the second part of the third section was changed to make clear that the 1870 Act was to be enforced according to the enforcement provisions of the 1866 Act. (Also, "emigrating" was changed to "immigrating"; *see infra* note 37.)

> rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill.

Cong.Globe at 1536. On the basis of this passage, both *Guerra*, 498 F.2d at 653, and *Espinoza v. Hillwood Square Mutual Ass'n*, 522 F.Supp. at 564, have concluded that § 16 was intended to reach private discrimination because it "extends the operation" of the 1866 Act to alienage discrimination. This reasoning, however, overlooks the fact that Senator Stewart and his contemporaries did not view the 1866 Act as reaching private discrimination.[35] The first sentence of the quoted passage—the 1866 Act protects citizens "in the equal protection of the laws"—shows this clearly. The codifiers of federal law thought the same thing in 1874, and gave § 1981 the title that it retains to the present day: "Equal rights under the law." The Supreme Court thought the same thing a decade later. *See Civil Rights Cases*, 109 U.S. 3, 16, 3 S.Ct. 18, 24, 27 L.Ed. 835 (1883). And few thought to the contrary until 1968.

Later, Senator Edmunds introduced S810, a bill to enforce voting rights under the fifteenth amendment. Cong. Globe at 2808. On May 16, Senator Stewart offered a slightly modified version of S.365 as part of an amendment to S.810. Cong.Globe at 3480. Subsequent debate in the Senate focused on S.810's voting rights provisions and the voting rights provisions of H.R. 1293, the counterpart of S.810 which had already passed the House. Senator Stewart, however, gave a soliloquy on the equal protection provisions on May 20. His remarks show that he, as au-

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35. *See supra* note 32.

thor and original sponsor, viewed the provisions as an implementation of the fourteenth amendment:

> While [Chinese aliens] are here I say it is our duty to protect them. I have incorporated that provision [S.365] in this bill on the advice of the Judiciary Committee, to facilitate matters and so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill, and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are. That is all there is in that provision.
>
> Why is not this bill a good place in which to put that provision? Why should we not put in this bill a measure to enforce both the fourteenth and fifteenth amendments at once? . . . The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws. Your treaty says that they shall have the equal protection of the laws. Justice and humanity and common decency require it. I hope that provision will not be left off this bill, for there is no time to take it up as a separate measure, discuss it, and pass it at this session.

Cong.Globe at 3658. The Senate passed H.R.1293 (including the provisions of S.365) the following day. Cong.Globe at 3690.[36] The rest of the legislative history of § 16 in both the House[37] and the Senate[38] is completely consistent with

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36. H.R. 1293 was passed by a vote of 43-8 under the title "A bill to enforce the right of citizens of the United States to vote in the several States of this Union." Senator Stewart moved to amend the title:

> Mr. STEWART. Add there the words "and for other purposes."
>
> Mr. SUMNER. Why do you want to have "other purposes" in?
>
> Mr. STEWART. Here is a provision to enforce the fourteenth amendment. Strike out all after "Union" and insert "and for other purposes."
>
> Mr. SUMNER. That is the whole case.
>
> Mr. STEWART. No; the fourteenth amendment, to prevent improper holding of office, and then the civil rights bill have been put on.

The motion passed and the title was amended. Cong.Globe at 3690.

37. The equal protection provisions of the Voting Rights Act appeared in the House for the first and only time during the discussion the conference report on H.R. 1293. Representing Bingham, who sponsored H.R. 1293, was a House conferee, and was the floor manager of the bill that emerged from conference, reviewed the conference report section by section:

> Touching the provision of the Senate amendment limiting the power of the States to impose taxes upon immigrants, I wish to say that the only change made by the conference committee is the change of the word "emigrants" to "immigrants;" and that the only effect of the section is to assert the power of the United States, under the express provision of the national Constitution, over the several States of this Union to this extent and no further, that hereafter the taxes imposed by the several States upon immigrants thereto shall be equal; that the States shall not hereafter discriminate against the immigrant from China

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the soliloquy of its author and original sponsor Senator Stewart. *See also Runyon*, 427 U.S. at 195-205, 96 S.Ct. at 2606-2611 (White, J., dissenting) (reviewing the history of § 16 of the 1870 Act as part of his unsuccessful argument that § 1981 was derived *entirely* from the 1870 Act); *De Malherbe*, 438 F.Supp. at 1137-40. Whatever the intentions behind the 1866 Act, it is clear that the 1870 Act was passed as a statutory implementation of the fourteenth amendment, and that state action is therefore required for alienage discrimination to violate § 1981.[39]

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and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland; that immigrants[,] being persons within the express words of the fourteenth article of the constitutional amendments, shall, whenever they may be found within the jurisdiction of any of the States of the Union, be entitled to the equal protection of the laws, not simply of the State itself, but of the Constitution of the United States as well.

Cong.Globe at 3871.

38. There was sharp debate over the voting rights bills leading to the 1870 Act, but little mention of the section that became 16 and eventually § 1981. In one of those few passages, Senator Sherman ruminated about S.810 and S.365:

> These bills seem to have the sanction of the Judiciary Committee. Probably after examination I might approve them; but they are certainly adding an independent subject, making it necessary to change the title of this bill, to change the scope of it, to enlarge greatly the purpose for which the House bill [H.R. 1293] was passed, because *these provide for enforcing the fourteenth amendment* as well as the fifteenth, and provide also for dragging into the controversy the Chinese question and questions of that kind. I am not sure but that after discussion I would agree with the Committee on the Judiciary, that we must *protect the Chinese against the local laws of California;* but it seems to me we ought to do it with our eyes open, and understand what we are doing.

Cong.Globe at 3570 (emphasis added).

39. We express no opinion on the scope of § 1981 in the state-action context. *See supra* note 18.

Try as we may, we cannot avoid the conclusion that *Guerra* was wrongly decided. To the extent that § 1981 derives from § 16 of the 1870 Act, it should not be interpreted as prohibiting private discrimination. The two arguments in *Jones* that apply to the 1870 Act are unpersuasive, and the persuasive argument does not apply. Because of the curious dual derivation of § 1981, we embrace Justice White's "logical impossibility" that the same language in the same statute can "mean one thing with respect to one class of 'persons' and another thing with respect to another class of 'persons' " *Runyon*, 427 U.S. at 206, 96 S.Ct. at 2611 (White, J., dissenting).[40]

C

Guerra was decided over twelve years ago. Subsequent panels of our Court have dealt with *Guerra* inconsistently. Many have reiterated the holding of *Guerra* unequivocally in dicta. *See Jett v. Dallas Indep. School Dist.*, 798 F.2d 748, 762 (5th Cir. 1986) ("section 1981 provides a cause of action for public or private discrimination based on race or alienage"); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 762 (5th Cir. 1986) ("[b]oth the Supreme Court and the Fifth Circuit have held that 1981 applies to aliens." citing *Guerra* and *Graham v. Richardson*); *Garner v. Giarrusso*, 571 F.2d 1330, 1340 (5th Cir. 1978) ("[§ 1981] protects only against discrimination on the basis of race or alienage," citing *Guerra*); *Watkins*

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40. *But cf. Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) ("prevailing party" in civil rights statutes awarding attorneys' fees to "prevailing party" means one thing as to party plaintiff, another as to party defendant)

v. United Steel Workers of America, Local No. 2369, 516 F.2d 41, 49 (5th Cir. 1975) ("In *Guerra*, we held that § 1981 prohibits discrimination against aliens even though Title VII does not prohibit such discrimination. . . ."). Other opinions incorporate bald statements that seem inconsistent with *Guerra* without mentioning it. *See Olivares v. Martin*, 555 F.2d 1192, 1196 (5th Cir.1977) ("race must be a factor in discrimination under § 1981"); *McLellan v. Mississippi Power and Light Co.*, 526 F.2d 870, 876 n. 9 (5th Cir.1976) ("Sections 1981 and 1982 make specific reference to race and therefore have not been extended to nonracial discrimination. . . ."), *vacated in part on other grounds*, 545 F.2d 919 (5th Cir.1977) (en banc).

We can find only one case in this Circuit that has followed *Guerra* in its analysis, although its holding can be justified on other grounds. In *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir.1980), plaintiffs were denied employment by a municipality because of alienage. They challenged the discriminatory policy on both equal protection and § 1981 grounds. The policy probably was unconstitutional under the 'strict scrutiny" of *Graham v. Richardson* and its progeny. The court, however, analyzed the problem and held for the plaintiffs entirely on § 1981 grounds, citing *Guerra* with approval. The court made no mention of "state action" or of any other distinguishing ground.

But *Guerra* has been questioned. One line of cases in this Circuit, noting the emphasis on *racial* discrimination by the Supreme Court in all its § 1981 and § 1982 decisions, has viewed *Guerra* skeptically on that basis. These cases have sought to blunt the full impact of *Guerra* by creatively "reinterpreting" it as turning in part on racial dis-

crimination. In *Campbell v. Gadsden County Dist. School Bd.*, 534 F.2d 650 (5th Cir.1976), for example, a panel of our Court upheld a claim by a black under § 1981. In a footnote, the court pointed out that cases upholding actions for private discrimination under § 1981 always involved *racial* discrimination. The court quoted the Supreme Court's statement about § 1982, which it characterized as "the companion statute to section 1981," that " 'the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.' " 534 F.2d at 654 n. 8 (quoting *Jones*, 392 U.S. at 413, 88 S.Ct. at 2189). The court stated:

> Our court has construed section 1981 broadly enough to embrace claims regarding employment discrimination on the basis of alienage. *Guerra*. It should be noted, however, that the discrimination against Mexicans involved there has strong racial overtones.

534 F.2d at 654 n. 8 (citation omitted).

Campbell's reading of *Guerra* has proved to be a popular rebuttal whenever *Guerra* is cited by plaintiffs as authority for a broad reading of § 1981. In *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340 (5th Cir.1981), *cert. denied*, 456 U.S. 933, 102 S.Ct. 1985, 72 L.Ed.2d 451 (1982), the plaintiff argued that § 1981 prohibits private sex discrimination. A panel of this court correctly rejected this contention.[41] Reflecting on the strong racial emphasis of

41. The court notes that the phrase "white citizens" was inserted in § 1 of the 1866 Act in order to *maintain* legal disabilities of women and minors. The prior language was thought to invalidate such state laws. 662 F.2d at 343. One clever group of plaintiffs has made the theoretically interest-

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Runyon and *McDonald v. Santa Fe Trail Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (whites have action under § 1981 for racial discrimination), the court stated:

> we have previously characterized *Guerra* as a broad construction of § 1981 in a case with "strong racial overtones." *Campbell v. Gadsden County Dist. School Bd.* Whatever vitality it may retain, *Guerra* did not propose extending § 1981 to sex discrimination, and thus lends no support to Bobo's contentions.

662 F.2d at 344 (citation omitted). *See also Daigle v. Gulf State Utilities Co., Local No. 2286*, 794 F.2d 974, 980 (5th Cir.1986) (rejecting a claim that § 1981 protects "scabs" from discrimination; *Guerra* was "a case with 'strong racial overtones' ").[42]

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ing, if completely impractical, argument that § 1981 is unconstitutional on that basis. The idea seems to be that it was an unconstitutional invidious classification for Congress to provide a remedy for private discrimination based on race while omitting a remedy for other groups (now) protected by the fourteenth amendment. The argument was, of course, rejected, but it illuminates the almost surrealistic quality of the interaction of these 100-year-old statutes with modern judicial praxis. *See League of Academic Women v. Regents of Univ. of California*, 343 F.Supp. 636, 639 (N.D.Cal.1972).

42. These cases fictionalize the holding of *Guerra* somewhat in the worthy cause of maintaining a narrow remedial scope for § 1981. It does not appear to us that "racial" discrimination was a factor in *Guerra*. The court noted that the union which formulated the challenged policy was "composed predominantly of Mexican-Americans and Mexican Nationals." *Guerra*, 498 F.2d at 655 n. 36. The plaintiff was Mexican, as was the person who replaced him under the challenged policy. It may be, moreover, that those panels which have attempted to reinterpret *Guerra* did not fully appreciate the dual origin of § 1981, and the fact that all Supreme Court cases involving § 1981 and § 1982 have turned on the meaning of the 1866 Act alone.

Despite our Court's reservations regarding *Guerra*, nothing in Supreme Court doctrine or our decisions en banc has clearly undermined its holding. There have been only three hints that the Supreme Court might reject *Guerra's* analogy between the 1866 Act and the 1870 Act. First, the Supreme Court has explicitly noted that the question is still open. *See Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 96 n. 9, 94 S.Ct. 334, 340 n. 9, 38 L.Ed.2d 287 (1973). Second, the Court has seemed willing, at least for the sake of argument, to acknowledge that § 1981 may, to the extent that it is derived from the 1870 Act, have a different reach. *See Runyon*, 427 U.S. at 168 n. 8, 96 S.Ct. at 2593-94 n. 8. Third, the Court has indicated a willingness to view the 1870 Act as closely tied to the fourteenth amendment, which would remove it from the realm of private action. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389, 102 S.Ct. 3141, 3149, 73 L.Ed.2d 835 (1982) (discussing the derivation of § 1981: "The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment."). These hints are no more than that; they do not seriously call *Guerra* into question.

D

The district court in the case before us noted that *Guerra* had not been overruled. Nevertheless, the court "decline[d] to follow" *Guerra* because *Bobo* and *Campbell* "place into question both the applicability of the [Civil Rights] Act to instances of private alienage discrimination and its applicability to discrimination other than racial discrimination."

We have reviewed the legislative history of the 1866 and 1870 Acts that form the basis of § 1981, and we have considered the Supreme Court's authoritative exposition of the statute and its predecessors. Although it is perfectly legitimate to assume with *Guerra* that § 16 of the 1870 Act was intended to extend to aliens the very same kinds of protections as § 1 of the 1866 Act extended to racial groups, that assumption does not fit the language of the statute and its legislative history. *Guerra* relied too heavily on a perfect parallel between the 1866 Act and the 1870 Act. The Supreme Court's prohibition of private racial discrimination is justifiable on the basis of the unique history of the 1866 Act. Nothing in the history of the 1870 Act, however, supports an extension of the dubious analysis of *Jones* and *Runyon* to the later statute; and we are convinced that *Guerra* was wrongly decided.

But that does not end the inquiry. It is firmly established policy of our court that one panel does not overrule another "in the absence of intervening and overriding Supreme Court decisions." *White v. Estelle,* 720 F.2d 415, 417 (5th Cir.1983). Nor can a district court do so.[43] Intervening Supreme Court decisions have dealt with the meaning and scope of the 1866 Act, but have not clearly undermined *Guerra* and its interpretation of the 1870 Act. At most, the Supreme Court has intimated that the 1870 Act *might* have a narrower reach than the 1866 Act. Therefore, *Guerra* remains the law of this Circuit, binding us and the trial court.

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43. The district court acknowledged that *Guerra* had not been overruled, but "decline[d] to follow" it without mention or analysis of intervening Supreme Court decisions.

That court found that First National discriminated against Bhandari on the basis of his alienage. First National has not suggested any reason why its consumer credit activities should be subject to a different analysis under § 1981 than employment contracts or publicly offered education by private schools. Therefore, First National is liable to Bhandari under § 1981 for a violation of his civil rights. We remand the case to the district court to determine whether Bhandari is entitled to additional relief.

III

Bhandari contends that the district court made a number of errors in adjudging his claims under the liability provisions of the Equal Credit Opportunity Act. First, he suggests that the district court erred in holding that the ECOA does not prohibit discrimination based on citizenship or alienage. Second, he argues that the district court erred in ruling that he was not discriminated against on the basis of his national origin. Third, he claims that the district court should have granted him limited injunctive relief. Finally, he contends that the actual damages awarded him by the district court for First National's violation of the notice provisions of the ECOA were too small, and that the court should have awarded him punitive damages.

A

The ECOA prohibits discrimination against credit applicants "on the basis of race, color, religion, national origin, sex or marital status. . . ." 15 U.S.C. § 1691(a)(1). The language is closely related to that of Title VII of the Equal Employment Opportunity Act ("EEOA"), 42

U.S.C. § 2000e-2,[44] and was intended to be interpreted similarly. The "race, color, religion, national origin" language was added by amendments to the ECOA in 1976. Pub.L. No. 94-239, 90 Stat. 251 (1976). According to the Senate Report on the amendments:

> The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. . . . In determining the existence of discrimination on these grounds . . . courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, 401 U.S. 424[, 91 S.Ct. 849, 28 L.Ed.2d 158] (1971), and *Albemarle Paper Company v. Moody*[, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280] (U.S. Supreme Court, June 25, 1975) are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.

S.Rep. No. 589, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 U.S.Code Cong. & Ad. News 403, 406 (footnote omitted).

Prior to the 1976 amendments, the Supreme Court held that almost identical language in the EEOA does not prohibit discrimination on the basis of alienage. *See Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). The question is whether this "judicial construction of anti-discrimination legislation in the employment field" applies to the ECOA.[45]

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44. Title VII makes it unlawful to discriminate in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

45. There is almost no judicial authority on this issue, but one case has applied the rule of *Espinoza* to a claim under the ECOA. *See Nguyen v. Montgomery Ward & Co.*, 513 F.Supp. 1039 (N.D.Tex.1981).

The reasoning of *Espinoza* controls this case. Discrimination purely on the basis of alienage does note violate the ECOA. The rationale of *Espinoza* does not suggest any grounds for distinguishing the federal credit anti-discrimination law from federal employment anti-discrimination law when the relevant statutes use almost identical language. Furthermore, we must assume Congress was aware of this important Supreme Court decision handed down several years before the amendments adding the EEOA-like language to the ECOA; the legislative admonition to follow federal employment law makes our decision easy.

B

Bhandari does not seriously dispute our holding that alienage discrimination without more is not forbidden by the ECOA. Instead, he focuses his arguments on establishing that he was discriminated against on the basis of his national origin. National origin discrimination is, of course, illegal under the ECOA. 15 U.S.C. § 1691(a)(1).

Bhandari could have shown national origin discrimination in either of two ways. First, he could have shown that First National actually discriminated against him because of his Indian origin. *See Miller v. American Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir.1982) (marital status discrimination). Or, he could have shown, by analogy to *Griggs v. Duke Power* and its progeny, that First National's facially permissible alienage discrimination had the effect of discriminating against Indians. *See Williams v. First Federal Savings & Loan Ass'n*, 554 F.Supp. 447, 449 (N.D.N.Y.1981) (sex and marital status discrimination), *aff'd mem.*, 697 F.2d 302 (2d Cir.1982); *Cragin v.*

Federal Savings & Loan Ass'n, 498 F.Supp. 379, 384 (D. Nev. 1980) (sex and marital status discrimination); *Cherry v. Amoco Oil Co.*, 490 F.Supp. 1026, 1030 (N.D.Ga.1980) (racial discrimination); S.Rep. No. 589, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 U.S.Code Cong. & Ad.News 403, 406 (quoted above).

The district court held that Bhandari failed to make either showing. We agree. There is nothing in the record that suggests that Bhandari's application was denied because he is of Indian origin.[46] Furthermore, Bhandari never seriously attempted to make out a prima facie case that First National's policy had an adverse impact on persons of Indian origin, or on persons of any particular origin for that matter. Instead, he continually returns to the argument that discrimination against aliens has the effect of discriminating on the basis of national origin. Of course, it is true that alienage discrimination has the effect of discriminating against persons of origins other than the United States; the vast majority of aliens are foreign-born. But we decline to embrace the *reductio ad absurdum*. This was the position of Justice Douglas in *Espinoza*, but he was in dissent. Bhandari's argument contradicts the

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46. Bhandari argues that the policy of rejecting applications by aliens was instituted by First National to avoid issuing credit cards to Nigerians. There is evidence in the record that many banks were concerned about several well-publicized incidents of credit card fraud by Nigerian students. A pretextual blanket policy of denying credit to aliens because of the desire to discriminate against persons of a specific national origin might appear to violate the ECOA. The district court found, however, that First National's policy was put in place before the concerns about Nigerians arose. Therefore, we need not discuss whether a person of one national origin could challenge a policy put into place with an illegal purpose to discriminate against persons of a different national origin.

holding of *Espinoza* that national origin discrimination is distinct from alienage discrimination.

So it is in one sense not surprising that in the alternative, and "[o]ut of an abundance of caution," Bhandari "respectfully submits" that "*Espinoza* is wrong and certain language therein should be overruled." That argument is not appropriately addressed to us; it should be directed to the Supreme Court, or perhaps Higher—and we do not consider it.

C

Bhandari originally sought to enjoin First National's policy of denying credit to aliens. The district court ruled during pretrial maneuverings that the policy had been changed, dismissing Bhandari's claims for declaratory and injunctive relief as moot.

Bandari now argues that the district court erred in dismissing all his claims for equitable relief. He points to one passage in the record where he argued that some of his claims for relief were not mooted by the change in policy. Specifically, he argues that the district court erred in not requiring First National to use credit analysts rather than credit clerks to handle complaints about credit denials: "[W]e believe the Court should tell the Bank that when someone writes back and complains, that certainly a credit analyst (and perferably the particular credit analyst who made the denial) should review that material in order to further the purpose that Congress intended in passing the Equal Opportunity Credit Act."

We see no merit in Bhandari's argument, but we need not reach it. Bhandari has no standing to raise the issue.

To meet the standing requirement of Article III of the Constitution, Bhandari must show at a minimum that he has suffered some actual or threatened injury resulting from the allegedly illegal conduct of the defendant *and* that the injury is likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472-76, 102 S.Ct. 752, 758-61, 70 L.Ed.2d 700 (1982). Bhandari has alleged an injury, but he would not benefit from the relief sought. He is no longer transacting business with First National. He has not alleged that he intends to reapply to First National for a credit card. Bhandari has no more than an ideological interest in the outcome he seeks; his claim for injunctive and declaratory relief is the sort of by-stander's suit forbidden by Article III. *See Valley Forge*, 454 U.S. at 472-73, 102 S.Ct. at 758-59.

D

The district court awarded Bhandari $1,001.35 in actual damages for First National's violation of the notice provisions of the ECOA. The court found that his only out-of-pocket loss was $1.35 in postage. The court awarded Bhandari an additional $1,000 for the "private, momentary and personal affront" caused by the procedurally flawed denial of credit. Damage awards are findings of fact not subject to reversal unless clearly erroneous. *NCH Corp. v. Broyles*, 749 F.2d 247, 254 (5th Cir.1985). The damages awarded by the district court were not clearly erroneous. On remand, the district court must determine if First National's violation of Bhandari's civil rights under § 1981 caused any additional damages.

Bhandari maintains that punitive damages are mandatory upon a finding of liability under the ECOA, and that the district court therefore erred in assessing none against First National. The language of the statute supports Bhandari's argument: "Any creditor . . . who fails to comply with any requirement imposed under this subchapter *shall be liable* to the aggrieved applicant for punitive damages in an amount not greater than $10,000. . . ." 15 U.S.C. § 1691e(b) (emphasis added). The statute sets our various factors to be considered in establishing the amount of punitive damages, none of which requires that the violation be intentional or reckless. *Id.*[47]

The courts, however, have not been receptive to a simple reading of the statute. In *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir.1983), a panel of this court read the statute to mean that punitive damages may be awarded "if the creditor's conduct is adjudged wanton, malicious or oppressive, or if it is deemed to have

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47. The entire section reads:

> Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damagase awarded, the frequency and persistence of the failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

15 U.S.C. § 1691e(b).

acted in reckless disregard of the applicable law." 708 F.2d at 148. *Fischl* relied on *Anderson v. United Finance Co.*, 666 F.2d 1274 (9th Cir.1982) and *Shuman v. Standard Oil Co.*, 453 F.Supp. 1150 (N.D.Cal.1978) for this tight-fisted reading of § 1691e(b). A certain sound still echoes faintly in the hallways of the judicial mind—"statutes in derogation of the common law are to be strictly construed" —but *Fischl's* reading of the statute is doubtless good policy, and in any event controlling.

There was no showing of wanton or reckless behavior. After the childish misbehavior of the clerk who lied to Bhandari, First National took steps to deal with Bhandari's complaints in a reasonable manner. First National offered Bhandari credit as early as February 1984, changed its the disputed "guideline" in February 1984, and altered its applications to remove the question about citizenship in November 1984. In addition, the actual "violation" may never have occurred. The district court's finding was based on what were intended to be self-serving comments by defendant's employees designed to show that they did not deny Bhandari credit on the basis of his alienage or national origin. On this record and under the authority of *Fischl*, we affirm the district court's denial of punitive damages.

IV

The district court admitted evidence of settlement negotiations between the parties before the case was filed. Bhandari argues that the evidence was inadmissible under Rule 408, Federal Rules of Evidence. Rule 408 excludes evidence of settlement negotiations if offered to prove or disprove liability. The Rule itself provides,

however, that it "does not require exclusion when the evidence is offered for another purpose. . . ." Whether evidence should be admitted for another purpose is within the discretion of the district court; the decision to admit or exclude evidence proferred for other purposes will be reversed only for an abuse of that discretion. *Belton v. Fibreboard Corp.*, 724 F.2d 500, 505 (5th Cir. 1984).

The district court did not abuse its discretion. The disputed evidence was admitted to determine whether Bhandari failed to mitigate damages. This purpose is permissible under Rule 408. *See Urico v. Parnell Oil Co.*, 708 F.2d 852, 854-55 (1st Cir.1983).

V

A

The district court awarded Bhandari attorneys' fees of $1,500 under the ECOA, 15 U.S.C. § 1691e(d);[48]

> The Court is bound by statute to award attorney's fees under the ECOA in light of plaintiff's successful claim. However, the lack of damages to plaintiff's creditworthiness, the Court's perception of plaintiff's failure to minimize costs by prosecuting this case absent such damages; and plaintiff's unilateral choice in bringing about a sizable investment in attorney's time; all compel a minimal award of $1,500 for

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48. The section reads:

> In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

15 U.S.C. § 1691e(d).

> attorney's fees. In making this award, the Court notes plaintiff has failed to prevail on most of his claims . . . The only claim upon which he has prevailed could have been resolved prior to suit, at which time plaintiff's attorney assessed his fees at $1,500. The Court therefore concludes this is an appropriate award.

Op. at 13. Because we have held that Bhandari's civil rights were violated by First National under *Guerra's* interpretation of § 1981, we must remand the issue of attorneys' fees to the district court for reconsideration. *See* 42 U.S.C. § 1988.

Even though this issue must be remanded, we think it important to point out that the district court's initial determination of attorneys' fees involved both factual and legal error. The factual error is the district court's apparent belief that Bhandari could have settled before trial for what he eventually received after much time and effort. Bhandari's settlement offers were *rejected* by First National. First National's only offer was the informal one by Richardson to give Bhandari a credit card if he otherwise qualified. As soon as Bhandari's attorney raised the issue of attorneys' fees, Richardson stated that he would have to check with First National's lawyers. There is no other evidence in the record of First National's willingness to settle on any terms that involved any cash payments to Bhandari. Thus, the court erred in concluding that Bhandari's prosecution of this case was a "failure to minimize costs," or otherwise of questionable propriety.

On the basis of its factual mistake, the court set the amount of attorneys' fees at the amount estimated by Bhandari's lawyer as incurred at the time of a settlement

offer made before the case was filed. The district court noted that it had not considered the attorneys' fees factors mandated by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974),[49] "because to do so would result in a negative finding and prevent the mandatory award for plaintiff's successful ECOA action." This shortcut was legal error. Whatever the underlying facts, the court may not avoid making the determination required by *Johnson* and *Hensley v. Eckerhart*, 461 U.S. 424, 432 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983), by arbitrarily awarding a figure discussed in pre-trial negotiations.

We recognize that recent Fifth Circuit law on the status of *Johnson* is in disarray. The Supreme Court decisions in *Hensley* and *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), have weakened the case for strict allegiance to the *Johnson* factors, and the strain is beginning to show.[50] Compare *Nisby v. Commissioners*

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49. Although the Federal Reporter is probably two volumes thicker due to recitations of the *Johnson* factors, we recite them again for the reader's convenience: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

50. *Johnson* had been cogently criticized by many judges and scholars well before the questions raised by *Hensley* and

(Continued on following page)

Court of Jefferson County, 798 F.2d 134, 137 (5th Cir.1986) (reversing attorneys' fee ward based on a "lodestar" calculation because "the district court did not evaluate specifically the applicability of each of the *Johnson* factors"; *Hensley* and *Blum* do not alter the rule of *Johnson*), with *Brantley v. Surles*, 804 F.2d 321, 326 (5th Cir.1986) (upholding award where district court dismissed a number of *Johnson* factors without discussion; "This is sufficient here because we can say the overall fee calculation meets the Supreme Court's guidelines in *Blum* and *Hensley*"). One recent case on this issue includes a spirited dissent, something rare before *Hensley* and *Blum*. *See Abrams v. Baylor College of Medicine*, 805 F.2d 528, 537 (5th Cir. 1986) (Johnson, J., dissenting). On remand, the district court must make of this muddle what it can. *See Nisby*, 798 F.2d at 137 (Hinojosa, District Judge, concurring) (suggesting clarification by the Court). Under any conceivable standard, however, the court must carefully analyze the time spent, the claimed hourly rate, and the degree of success in the action; it may not rely on figures plucked from settlement negotiations.

B

Depositions were submitted in place of live testimony. The district court "taxed" the deposition expenses equally to both parties as "costs," and ordered

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(Continued from previous page)

Blum. See, e.g., Copeland v. Marshall, 641 F.2d 880, 889-90 (D.C. Cir.1980) (en banc); Ramos v. Lamm, 539 F.Supp. 730, 735-38 (D.Colo.1982), vacated and remanded, 713 F.2d 456 (10th Cir.1983); Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U.Pa.L.Rev. 281, 285-87 (1977).

First National to pay all other costs. Bhandari argues that he was the prevailing party and thus entitled to have First National pay all costs. We agree.

The initial determination of what expenses are costs is for the informed discretion of the district court. *Brumley Estate v. Iowa Beef Processors*, 704 F.2d 1362, 1363 (5th Cir.1983). The expense of depositions reasonably necessary to the case may be awarded as costs. *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir.1982). The "prevailing" party ordinarily recovers costs, but a party need not prevail on all issues to justify an award. *Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 131 (5th Cir.1983).

Bhandari is the prevailing party in this case. He is entitled to costs under 15 U.S.C. § 1691e(d). The district court has no authority to split items of expense once it classifies them as costs. On remand, the district court should award the cost of depositions to Bhandari.

VI

Today, as we must, we reluctantly reaffirm the holding of *Guerra v. Manchester Terminal Corp.*; aliens can sue under § 1981 for private alienage discrimination. The district court found that First National discriminated against Bhandari because of his alienage. We remand for appropriate relief. We affirm the district court's determination that alienage discrimination is not prohibited by the Equal Credit Opportunity Act, and that Bhandari was not discriminated against because of his national origin. We also affirm the damage awards under the EOCA and reject Bhandari's claim for injunctive relief.

We remand the question of attorneys' fees and costs for further proceedings consistent with our opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JEETENDRA BHANDARI	CIVIL ACTION
VS.	NO. 84-2311
FIRST NATIONAL BANK OF COMMERCE	SECTION "A"

J U D G M E N T

(June 28, 1985)

Considering the written reasons on file herein, accordingly:

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of plaintiff, Jeetendra Bhandari and against defendant, First National Bank of Commerce in the amounts of $1,001.35 for actual damages and $1,000.00 for attorney's fees, as a result of FNBC's violation of the Equal Credit Opportunity Act, together with legal interest from the date of judgment. All other claims by plaintiff are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the total costs of the depositions shall be taxed to both parties, to be divided between them equally, with all other costs to be paid by defendant.

New Orleans, Louisiana, this 28th day of June, 1985.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JEETENDRA BHANDARI	CIVIL ACTION
VS.	NO. 84-2311
FIRST NATIONAL BANK OF COMMERCE	SECTION "A"(2)

OPINION

(June 27, 1985)

SCHWARTZ, J.

This matter came before the Court for nonjury trial on April 18, 1985, at which time both parties declined to offer live testimony and submitted the matter to the Court upon stipulations, depositions previously taken, memoranda and exhibits. After review of the record, the memoranda and the applicable law, the Court rules as follows. To the extent any of the following findings constitute conclusions of law, they are adopted as such, and to the extent any conclusions of law constitute findings of fact, they are so adopted.

INTRODUCTION

Plaintiff, Jeetendra Bhandari, filed this suit against First National Bank of Commerce ["FNBC"], for violations of the Equal Credit Opportunity Act ["ECOA"], 15 U.S.C. §§ 1691-1691e, and the Civil Rights Act of 1870, 42 U.S.C. § 1981, in connection with FNBC's denial of a Visa card to plaintiff.

Specifically, plaintiff seeks actual and punitive damages and declaratory and injunctive relief for FNBC's denial of a Visa card to plaintiff based on illegal discrimination on account of plaintiff's national origin and his status as a noncitizen of the United States. Plaintiff had originally claimed discrimination based on race and color, but moved to dismiss those claims immediately prior to submission of the case. Plaintiff further admits his claims for declaratory and injunctive relief under the ECOA and federal regulations are now moot. See Plaintiff's trial memorandum, pages 22-23. Plaintiff also seeks actual and punitive damages and declaratory and injunctive relief based upon FNBC's alleged improper notice of adverse action. Lastly, plaintiff seeks attorney's fees as to all statutory violations.

FINDINGS OF FACT

There is agreement between the parties as to many of the pertinent facts. At all pertinent times, plaintiff was a citizen of India and a lawful permanent resident of the United States, having obtained successively a tourist visa, student visa, and permanent resident status. See also plaintiff's deposition, pages 6 & 11.

Plaintiff has held various jobs since his graduation from UNO. His most recent were a position with Cox Cable held for nine months and his employment for ODECO, earning approximately $19,500 annually, which he had held for three months prior to applying for the credit here at issue.[1]

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1. The Court finds it need not engage in any assessment of plaintiff's actual creditworthiness based upon job history in light of the defendant's use of the "judgmental" system of evaluating credit applications as described below.

Plaintiff first applied to defendant for a Visa card while working for Cox, but was denied credit because of insufficient credit history. Thereafter, upon plaintiff's employment with ODECO, he re-applied to FNBC for a Visa Card, which application was received by FNBC on October 27, 1983. See application submitted as Joint exhibit 2. At all relevant times, FNBC owned and operated First Bankcard Center, which issues consumer credit accounts. FNBC has over 400,000 bankcard customers and processes approximately 10,000 applications for bankcard credit per month.

In evaluating creditworthiness, FNBC utilizes a "judgmental" credit evaluation system, which the parties agree relies upon the judgment of the individual credit analyst in reviewing a particular credit application.[2] However, FNBC issued a listing of "basic criteria" for consideration by the credit analyst in reviewing personal credit applications, which at the time of plaintiff's application stated, "Applicant must be a U.S. Citizen unless the application is approved by an officer of the bank." See joint exhibit 21.

According to John Richardson, assistant vice president for FNBC, FNBC's application form had been amended in about May 1983 to add an inquiry into citizenship status. See Richardson deposition of November 21, 1984 ["Richardson deposition I"], page 21. There was no particular reason for this amendment, although it was claimed in retrospect to have served subsequently arising concerns regarding foreign student credit fraud. See id.,

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2. See also Richardson deposition of April 15, 1985 ["Richardson deposition II"], pages 40-41.

pages 24-27.[3] However, this Court finds that the citizenship criterion for review of credit applications was not at the time of its adoption tailored and utilized so as to address meaningfully any valid concerns, such as the collectibility of accounts. Moreover, all application forms submitted into evidence in this case requested information as to the length of time of residence at the address listed on the application, permitting further evaluation of collectibility. See joint exhibits 2, 13, 15, 17, & 19.

The Court further finds the bank made no effort to educate credit analysts as to the various categories of lawful residence in the United States, so as to permit a meaningful evaluation of the collectibility of accounts on the basis of status alone, even though that was the asserted goal of the citizenship criterion. See, e.g., Maurin deposition, pages 16-17; Savoie deposition, pages 11-13; Villavasso deposition, pages 6-8 & 11; Cocchiara deposition, pages 7-8; Armstead deposition, pages 22-23; Denny deposition, pages 12-13. No credit analyst recalled utilizing this criterion alone as the basis for denial of credit,[4] but the record reflects such denials and the Court finds they occurred. See joint exhibit 27. Nevertheless, the Court does not discern in this disordered practice a policy for across the board denial of credit to noncitizens, in that

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3. It has been stipulated that at the time of receipt of plaintiff's application, FNBC received notice of abuses of credit privileges by Nigerian students, who were defrauding creditors by absenteeing themselves to avoid collection. See also Richardson deposition II, pages 13-15.

4. Denny deposition, page 8; Villavasso deposition, page 6; Cocchiara deposition, page 11; Armstead deposition, pages 21, 26-27; Savoie deposition, pages 7-8; Maurin deposition, page 23.

noncitizen status merely triggered bank officer approval before credit would be granted. See also Richardson deposition I, page 45.

Against this background, it is further stipulated that on November 16, 1983, plaintiff received notice of the denial of his credit request, providing as the reason "Not a U.S. citizen." See joint exhibit 1. FNBC's internal records show a so-called "denial code" marking on plaintiff's October 1983 application of "A.A. I-37", indicating adverse action and that plaintiff was not a U.S. citizen. Thus, in light of the stipulations and the application, together with the deposition testimony of FNBC's credit analysts (see, e.g., Maurin deposition, pages 12 & 18-19), this Court finds that credit was denied because plaintiff was not a U.S. citizen, without consideration of plaintiff's status in the United States.[5] However, the Court further finds from the testimony of FNBC's credit analysts that they would have denied the plaintiff credit due to his insufficient length of employment with ODECO. See, e.g., Richardson deposition I, page 76; Maurin deposition, page 12; Savoie deposition, page 9; Denny deposition, page 6.[6] The Court thus finds on the basis of the deposition testimony that there were additional operative reasons for the denial of credit to plaintiff but that these were not com-

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5. The Court is unable to make any particularized finding as to the intent of the credit analyst who evaluated plaintiff's application because the record is unclear as to who made the decision. It was possibly Carmen Maurin, but she denied any recollection of the application. See Richardson deposition I, page 44; Maurin deposition, pages 10-11.

6. FNBC presumably relies upon this testimony in defense of the reasonableness of its actions. The Court finds it unnecessary to determine whether the credit denial was reasonable.

municated to the plaintiff at any time. See Richardson deposition I, page 97.[7]

The Court's finding that other factors in addition to citizenship were considered by FNBC and were operative in the denial of credit to the plaintiff is buttressed by FNBC's having run a credit check on the plaintiff at the time of his application. See joint exhibit 3 (showing credit inquiry of 11/2/83); Maurin deposition, pages 14 & 20. If FNBC intended to reject plaintiff's credit application on its face because of noncitizenship alone, investigating plaintiff's credit standing would have been superfluous.

The parties have also stipulated that on or about the time in question FNBC extended credit to at least three noncitizens, two of whom were asked about citizenship status on the applications. See joint stipulations 2-4. These stipulations are consistent with the parties' stipulation that some of the application forms submitted to noncitizen's did not inquire into citizenship status. However, the Court finds the disparity in application forms merely haphazard, resulting from circulating new application forms without withdrawing older forms. See Richardson deposition I, pages 21-22; Richardson deposition II, page 17.

The parties have further submitted as joint exhibit 27 a listing of reasons for denial of applications from noncitizens during August 15, 1983 to November 16, 1983, reciting that 46 noncitizens were denied credit, of which 29 were denied on the basis of noncitizenship alone. The

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7. See also Denny deposition, page 6; Armstead deposition, page 18; Savoie deposition, page 10; Cocchiara deposition, pages 12-13.

Court is unable to make a finding as to the number of applications actually received from noncitizens, because the record does not reflect such a figure and because the use of differing application forms prevents such a determination in this case. However, even assuming approximately one half of the noncitizen applicants were denied credit on that basis alone, this factor is not a conclusive indication of any policy on the part of the bank. The record establishes at most that, in practice, certain individuals were denied credit by individual analysts on the basis of citizenship.

The record is also devoid of any indication of any denial of credit based upon a particular nationality or that any particular nationality was considered as a factor in evaluating credit. There was no inquiry on the credit applications into nationality or place of birth.

The Court also finds that plaintiff's out of pocket expenses in connection with the credit application and inquiries amounted to $1.35 for postage. See plaintiff's deposition, page 54. However, the record does not show any actual damage to plaintiff's credit reputation, that any actions taken herein resulted in a denial of credit by any other potential creditor, or that plaintiff was subjected to any public humiliation.

CONCLUSIONS OF LAW

The Court exercises jurisdiction in this case pursuant to 28 U.S.C. §§ 1331, 1343 and 15 U.S.C. § 1691e (c) & (f).

In so doing, the Court is called upon to consider two distinct claims of discrimination: one, that defendant discriminated against plaintiff on the basis of his national origin; and two, that defendant discriminated against him

on the basis of his alienage. Both types of discrimination are alleged to constitute violations of the ECOA and the Civil Rights Act.

The Court here reiterates it finds no factual basis for plaintiff's claim of discrimination based upon national origin. In this regard, plaintiff has failed to establish a prima facie case that plaintiff's status as an Indian national (as opposed to any other nationality) in any way affected or determined defendant's intent and/or actions. Nor does plaintiff show any policies or actions taken by the defendant had the effect of discriminating against Indian nationals as a class apart from other nationalities. Significantly, plaintiff has dismissed his claim of racial discrimination, and the record discloses no racial discrimination effected secondarily through actions allegedly directed against Indian nationals.

Moreover, even assuming plaintiff was a victim of discrimination based upon national origin, the Court concludes the Civil Rights Act affords no remedy for national origin discrimination. *See Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982); *Mouriz v. Avondale Shipyards, Inc.*, 428 F. Supp. 1025, 1027 (E.D. La. 1977) (Rubin, J.). *See also Olivares v. Martin*, 555 F.2d 1192, 1195-96 (5th Cir. 1977) (Court finding plaintiff failed to state a claim under § 1981 because of failure to allege racial discrimination). By contrast, the ECOA expressly provides a cause of action for discrimination based upon national origin. *See* 15 U.S.C. § 1691 (a)(1).[8] How-

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8. Section 1691 (a)(1) provides in pertinent part, "It shall be unlawful for any creditor to discriminate against any applicant, with respect to a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age. . . ."

ever, plaintiff's ECOA discrimination claim against the defendant fails due to the absence of proof of discrimination based upon plaintiff's status as an Indian national.

The Court finds the record establishes unexplained and unreasoned discrimination against the plaintiff based upon his alienage, that is, his status as a noncitizen. However, upon consideration of the history of the Civil Rights Act and authorities in the Fifth Circuit, this Court concludes the Civil Rights Act does not proscribe private alienage discrimination. In reaching this conclusion, the Court declines to follow *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (statute applied to private alienage discrimination in respect of employment). Rather, this Court finds its determinations controlled by the subsequent language and authorities cited in *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340, 344 (5th Cir. 1981) and *Campbell v. Gadsden County Dist. School Board*, 534 F.2d 650, 653-54 n.8 (5th Cir. 1976). Although those cases have not overruled *Guerra*, they place into question both the applicability of the Act to instances of private alienage discrimination and its applicability to discrimination other than racial discrimination.

As to the claim that the ECOA proscribes alienage discrimination, the Court has found no controlling authority resolving this issue. Persuasive authority is found in *Nguyen v. Montgomery Ward & Co.*, 513 F. Supp. 1039 (N.D. Tex. 1981). The court in *Nguyen* cited *Espinoza v. Farah Manuf'g Co.*, 414 U.S. 86 (1973), for the proposition that alienage discrimination is not included within the ECOA's proscription against national origin discrimination. Thus, "national origin" does not embrace citizenship generally. Those authorities would, however, permit

a claim under the ECOA where the discrimination in question had the effect of discriminating on the basis of national origin. The Court does not find such a claim established in this case.

Nor does this Court find a violation of Regulation B, 12 C.F.R. § 202 (1983), due to a policy of refusing credit to noncitizens. Such a violation can be privately enforced, *see* 15 U.S.C. §§ 1691a (g) & 1691e (a) and 12 C.F.R. § 202.1(c), but the Court finds no prohibited policy existed at FNBC. The Court finds only that noncitizen status was used by an individual analyst as a factor in evaluating plaintiff's creditworthiness without rhyme or reason or any understanding of what rational inquiry noncitizenship status should trigger.

However, plaintiff makes one additional claim under the ECOA which this Court finds well founded, namely that FNBC violated the ECOA notice provisions. 15 U.S.C. § 1691 (d) (2). This determination is made in light of the Court's finding that the plaintiff's employment history was a factor in refusing his credit application. In this regard, the Court has considered the testimony of FNBC's own witnesses, who defend the refusal of credit to the plaintiff by calling into question his employment history.[9] In their zeal to avoid the appearance of any discriminatory acts or practices, those witnesses established additional reasons other than plaintiff's citizenship for denial of credit. Plaintiff should have been advised of those reasons, so as to enable him to rectify them if possible. *See Fischl v. GMAC*, 708 F.2d 143, 146-47 (5th

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9. See text at footnote 6 and footnote 7 supra. See also Richardson deposition I, pages 82 & 97.

Cir. 1983) (Court elaborating rationale behind notice provisions). In concluding FNBC violated the ECOA notice provisions, the Court rejects FNBC's contention that the adverse action letter's recital of credit denial based on noncitizenship was a mere clerical error, and therefore excusable. *See* 12 C.F.R. §§ 202.9 (e) & 202.2 (s) (1983).

The violation of the ECOA entitles plaintiff to an award of actual damages. Other than the $1.35 expenses of postage, the only evidence of damages is delineated in plaintiff's statements[10] and particularly joint stipulation of fact number 11. Stipulation 11 summarizes plaintiff's deposition testimony with respect to actual damages in addition to postage, as follows:

> 11. If he were called to testify, Mr. Bhandari would say that he was upset and humiliated because he had attempted to build a credit file for one year after an earlier rejection by FNBC; he was then denied credit and given as a reason "not a U.S. citizen." His citizenship is a factor he could not change at that time. He made an effort to advise FNBC of his lawful permanent resident status in order to persuade FNBC that his citizenship should not be a negative factor in determining his creditworthiness. He was again disappointed and hurt with [FNBC's] response. It offended his sense of fairness and democracy that he should be denied credit and given as a reason for the denial "not a U.S. citizen."[11]

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10. See plaintiff's deposition, page 67 and remarks of plaintiff's counsel, plaintiff's deposition, pages 69-70.

11. Plaintiff's denial inquiry was handled by FNBC credit clerk Kim Bosch. The Court finds both the plaintiff and Ms. Bosch equally culpable of childish behavior in their attempts to resolve plaintiff's credit application. See generally Bosch deposition; Richardson deposition II, pages 61-62.

There is no evidence whatsoever that plaintiff suffered any public humiliation or any damage to his creditworthiness as a result of this private communication to him.[12] For this private, momentary and personal affront, the additional sum of $1,000.00 reflects adequate compensation.

In fixing damages and attorney's fees (discussed below), the Court considers FNBC's offers to settle the case by rectifying its errors, over the plaintiff's objection that rule 408 of the Federal Rules of Evidence bars consideration of these actions by FNBC. The rule expressly precludes use of settlement negotiations as admissions of liability or weaknesses in a claim, and the Court has given no consideration to the evidence in question in determining liability. However, in a case such as this, once liability is determined, all defendant's subsequent actions must be considered in determining damages. Query, had defendant persisted in the acts for which complaint was made and not attempted to rectify its errors, could the Court ignore such action in assessing damages? Rule 408 specifically reserves use of such evidence, as here, for purposes other than proof of liability or invalidity of a claim.

Consideration of the settlement offers and remedial measures shows plaintiff could have achieved prior to suit without this litigation the relief he sought to obtain and to which he was entitled. Thus, plaintiff failed to mitigate damages by accepting the remedial efforts of defendant and chose to proceed with this case. Nor does the Court

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12. Plaintiff obtained a Visa card with Citibank within a few months of his refusal by FNBC, see plaintiff's deposition, pages 28 & 30, and FNBC offered in good faith to rectify its admitted errors and its admittedly inappropriate denial of credit to the plaintiff. See Richardson deposition I, pages 82, 97 & 100.

perceive this to be a case in which the principles at stake justify an effort disproportionate to the amount of damages in question. The record discloses plaintiff was offered credit from FNBC as early as February 1984; that FNBC clarified its review criteria in February 1984; and that FNBC altered its application form by November 1984. See joint exhibit 22; Richardson deposition I, page 95; Richardson deposition II, pages 6-8, 44-45, & 67-70. This suit was filed May 2, 1984. These same considerations warrant a denial of punitive damages under the Act.

Nor does the record herein warrant any injunctive relief for the notice violation. The credit analysts were aware of the necessity for identifying all reasons for denial of credit in cases of adverse action.[13]

The Court is bound by statute to award attorney's fees under the ECOA, see 15 U.S.C. §1691e (d), in light of plaintiff's successful claim. However, the lack of damages to plaintiff's creditworthiness, the Court's perception of plaintiff's failure to minimize costs by prosecuting this case absent such damages; and plaintiff's unilateral choice in bringing about a sizeable investment in attorney's time; all compel a minimal award of $1,500.00 for attorney's fees. In making this award, the Court notes plaintiff has failed to prevail on most of his claims, either by voluntary dismissal or by the Court's denial of such. The only claim upon which he has prevailed could have been resolved prior to suit, at which time plaintiff's attor-

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13. See, e.g., Villavasso deposition, page 10; Armstead deposition, pages 12-13; Denny deposition, page 10; Richardson deposition I, page 58; Savoie deposition, page 10; Maurin deposition, page 19.

ney assessed his fees at $1,500.00. See joint exhibit 29. The Court therefore concludes this is an appropriate award.[14]

For the foregoing reasons, the Court determines plaintiff is entitled to an award of actual damages in the amount of $1001.35 as a result of FNBC's violation of the ECOA. Plaintiff is not entitled to an award of punitive damages, and plaintiff's claims for injunctive relief are dismissed as moot. Plaintiff is further entitled to an award of $1,500.00 attorney's fees. Plaintiff's claims under the Civil Rights Act are dismissed with prejudice.

Lastly, since both parties elected to use depositions previously taken in lieu of live testimony, and since there was no indication any witness was unavailable to testify at trial, the total costs of the depositions shall be taxed to both parties, to be divided between them equally, with all other costs to be paid by defendant.

New Orleans, Louisiana, this 27th day of June, 1985.

/s/ Charles Schwartz, Jr.

UNITED STATES DISTRICT JUDGE

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14. The Court has not engaged in a detailed recital of the *Johnson* factors, because to do so would result in a negative finding and prevent the mandatory award for plaintiff's successful ECOA action. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Moreover, plaintiff's counsel has offered no evidence of attorney's fees nor filed contemporaneous time reports as required by Local Rule 21.16.

(2)

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1293

In the Supreme Court of the United States

OCTOBER TERM, 1987

JEETENDRA BHANDARI,
Petitioner

versus

FIRST NATIONAL BANK OF COMMERCE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

QUESTION PRESENTED

Does 42 U.S.C. § 1981 prohibit alienage discrimination in the making of private contracts?

PARTIES TO THE PROCEEDING

The following list of all parent, subsidiary and affiliate companies of the First National Bank of Commerce, is provided pursuant to Supreme Court Rule 28.1:

First Commerce Corporation
First National Bank of Lafayette
City National Bank of Baton Rouge
Rapides Bank and Trust Company of Alexandria
The First National Bank of Lake Charles
First Commerce Service Corporation
First Commerce Investment Service, Inc.
First Commerce Mortgage Corporation
New Orleans Bancshares, Inc.

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No. 87-1293

In the Supreme Court of the United States
OCTOBER TERM, 1987

JEETENDRA BHANDARI,
Petitioner

versus

FIRST NATIONAL BANK OF COMMERCE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Jeetendra Bhandari filed suit in the United States District Court for the Eastern District of Louisiana against the First National Bank of Commerce (hereinafter "FNBC"), pursuant to The Equal Credit Opportunity Act (hereinafter "ECOA"), 15 U.S.C. § 1691, and 42 U.S.C. § 1981 (hereinafter "§ 1981"), claiming alienage discrimination when FNBC rejected his application for a VISA card on the basis that he was not a United States citizen. He also claimed discrimination on the basis of national origin and charged FNBC with a violation of the technical notice provisions of the ECOA. Bhandari sought actual and punitive damages, as well as declaratory and injunctive relief, and prayed for attorney's fees.

Suggesting that *Guerra v. Manchester Terminal Authority*, 498 F.2d 641 (5th Cir. 1974), was no longer controlling, the district court dismissed the § 1981 claim for private alienage discrimination and, following *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), held that the ECOA does not provide a cause of action for discrimination on the basis of alienage. (Petitioner's Appendix D). The district court dismissed the national origin claims and refused to award punitive damages. The court did award damages and attorney's fees based on a technical notice violation. Finally, the claims for injunctive relief were dismissed as moot.

On appeal, a panel of the Fifth Circuit, citing its policy that one panel does not overrule another, "reluctantly reaffirm[ed] the holding of *Guerra*" (Petitioner's Appendix B at 77a) and reversed the lower court's dismissal of the § 1981 claim for private alienage discrimination. The court indicated its disapproval of *Guerra* with the statement that it could not "avoid the conclusion that *Guerra* was wrongly decided", (Petitioner's Appendix B at 59a) and remanded the case for a determination of attorney's fees in accordance with the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

FNBC petitioned the Court of Appeals for a rehearing en banc, which was granted, and on October 5, 1987, the Fifth Circuit overruled *Guerra*, holding that § 1981 does not prohibit alienage discrimination in the making of private contracts.

Bhandari has petitioned this Court for a Writ of Certiorari to review the Fifth Circuit's en banc decision.

SUMMARY OF THE ARGUMENT

The Fifth Circuit held that 42 U.S.C. § 1981 (a recodification of The Civil Rights Act of 1866 and The Voting Rights Act of 1870) does not prohibit private alienage discrimination. This does not conflict with Supreme Court precedent, which has held only that § 1981 proscribes governmental discrimination against aliens.

The legislative history of § 1981 fully supports this position. The author of the Senate version of The Voting Rights Act stated: "This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section."

The Court of Appeals did not withhold from Bhandari any right which Congress intended him to have, and this Court should not extend § 1981 beyond the boundaries delineated by Congress which historically has established different limits for racial and alienage discrimination.

ARGUMENT

I. The Fifth Circuit's Decision Does Not Conflict With the Precedents of This Court.

Bhandari's sole basis for suggesting that this Court should issue a Writ of Certiorari is the unsupported claim that the Fifth Circuit's en banc decision conflicts with applicable decisions of this Court.[1] To the contrary, the Fifth

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[1] Supreme Court Rule 17 provides guidelines indicating the general character of reasons governing review on certiorari. Another consideration suggested by the rule is where the federal court of appeals has rendered a decision in conflict with that of another circuit. That reason is not urged by Bhandari. Indeed, it does not exist.

Circuit's decision overruling *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), and thus limiting the application of 42 U.S.C. § 1981 to alienage discrimination under color of state law, is correct and in full accord with the decisions of this Court. Bhandari has attempted to manufacture the "conflict" with two double negatives.

The first double negative stems from Bhandari's contention that this Court has never "suggested that its reasoning [that § 1981 bars alienage discrimination under the color of law] should not apply to a private action." (Petition at 9). Bhandari concedes that this Court's decisions applying the protection of § 1981 to aliens "have all occurred in the context of governmental discrimination." *Id.* Specifically, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948), held that § 1981 protected " ' all persons' [meaning citizens and aliens] against *state legislation* bearing unequivocally upon them because of alienage." (emphasis added). Justice Black, writing for the majority, explained:

> The Fourteenth Amendment and the laws adopted under its authority [§ 1981] thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of *legal* privileges with all citizens under non-discriminatory *laws*. *Id.* (emphasis added).

Every other case relied upon by Bhandari addresses only discrimination under color of law.[2] In the absence of precedent, Bhandari uses the double negative to extend unjustifiably the principles of state action cases to private contracts.

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[2] *Graham v. Richardson*, 403 U.S. 365 (1971); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The second double negative arises from Bhandari's argument that "never has this Court intimated that this clause [§ 1981] would not apply to alienage discrimination." (Petition at 10). Although Bhandari acknowledges that this Court has only applied § 1981 to the "private sector. . .in the context of racial discrimination", he misplaces reliance on *Runyon v. McCrary,* 427 U.S. 160 (1976), for the proposition that § 1981 should be extended to private alienage discrimination. (Petition at 9-10). Bhandari ignores the *Runyon* Court's recognition that the facts there did not involve "the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." 427 U.S. at 167. Likewise, the other cases relied upon by Bhandari all addressed racial discrimination in one form or another.[3] None remotely involved alienage discrimination. As with the first double negative, Bhandari nevertheless uses the racial discrimination cases to broaden the scope of § 1981 to encompass private alienage discrimination.

Bhandari combines the two double negatives to reach, illogically, his "inescapable conclusion" that "Section 1981 bars alienage discrimination in the making of private contracts." (Petition at 10). Bhandari emphasizes *Saint Francis College v. Al-Khazraji,* 107 S.Ct. 2022 (1987), to reach his "inescapable conclusion." This logic is flawed: *Saint Francis College* is purely a race case. Justice White, writing for the unanimous Court, concluded that if the

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[3] *Shaare Tefila Congregation v. Coff,* 107 S.Ct. 2019 (1987); *Saint Francis College v. Al-Khazraji,* 107 S.Ct. 2022 (1987); *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976); *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975); *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

complainant can prove he has been discriminated against on the basis of his ancestry or ethnic characteristics, *rather than solely on national origin or religion,* such discrimination may be considered racial if the particular ethnic group would have been considered a distinct race which Congress intended to protect.[4] 107 S.Ct. at 2028.

Bhandari's final "equation" is: because the Supreme Court has *never* said that § 1981 should *not* apply to private alienage discrimination, the Fifth Circuit's decision conflicts with Supreme Court precedent. No conflict exists, and an examination of the legislative history of § 1981 will reveal that the Fifth Circuit's decision comports with congressional intent and the decisions of this Court.

II. The Fifth Circuit's Decision is in Full Accord With Congressional Intent as Evidenced by the Legislative History of § 1981.

The legislative history demonstrates that Congress intended § 1981 to prohibit alienage discrimination only under color of state law. As evidenced by legislative history, the Fifth Circuit's decision is in full accord with congressional intent. The historical genesis of § 1981 is § 1 of The Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (April 9, 1866), which granted to all United States *citizens* the same rights to make and enforce contracts and inherit, purchase, lease, sell, hold and convey real and personal property, as are enjoyed by *white citizens.* It sought only to

[4] Likewise, in *Shaare Tefila Congregation,* 107 S.Ct. 2019, members of a Jewish synagogue were entitled to bring a § 1982 claim because, when § 1982 was passed, Jews were considered to be a distinct *race* which Congress intended to protect. Notably, Bhandari amended his complaint to allege discrimination on account of race, but later, voluntarily dismissed that claim. The district court commented on this voluntary dismissal and observed that "the record discloses no racial discrimination effected secondarily through actions allegedly directed against Indian nationals." (Petitioner's Appendix A at 87a).

redress wrongs related to racial discrimination and was intended to protect citizens "in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude." *United States v. Cruikshank*, 92 U.S. 542, 555 (1875). The purpose was to implement the Thirteenth Amendment outlawing slavery and to eradicate its " 'badges and incidents'." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), quoting, *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

In 1870, Senator Stewart of Nevada, in response to a Senate resolution[5] mandating inquiry into violations of the Fourteenth Amendment by the states, introduced a bill to extend the 1866 Civil Rights Act to give aliens equal protection under the laws. S. 365, 41st Cong., 2d Sess. (1870) (hereinafter "S. 365"). The bill divided the 1866 Act into three sections. Section 1 enlarged the scope of protection by giving to "all persons", rather than to citizens alone, the right to make and enforce contracts but omitted the phrase "to inherit, purchase, lease, hold and convey real and personal property" found in § 1 of the 1866 Act.[6]

---

5 *Resolved*, That the Committee on the Judiciary be requested to inquire *if any States are denying* to any class of persons within their jurisdiction *the equal protection of the law*, in violation of treaty obligations with foreign nations and of section one of the *fourteenth amendment* to the Constitution; and if so, what legislation is necessary to enforce such treaty obligations and such amendment, and to report by bill or otherwise. Cong. Globe, 41st Cong., 2d Sess. 3 (1869)(emphasis added).

6 In the Fifth Circuit panel decision, Judge Gee explained the omission as reflecting the then current restrictions on the ownership and control of real property by aliens (Petitioner's Appendix B at 43a) and quoted a portion of the following exchange which provides insight into the author's intent that the bill extend to aliens the equal protection of the laws only:

> Mr. Stewart. I move that the Senate proceed to the consideration of bill (S. 365) to secure to all persons equal

Section 2 of the bill extended the coverage of the 1866 Act to provide for the punishment of any person who, *under color of state law,* deprived any inhabitant of any state or territory of any right secured by the Act on the basis of alienage, and § 3 reenacted the 1866 Act.

Senator Stewart explained the purposes of S. 365 and its relationship to the Civil Rights Act as follows:

> The original civil rights bill protected all persons born in the United States in equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill. Cong. Globe, 41st Cong., 2d Sess. 1536 (1870) (hereinafter "Cong. Globe").

(Footnote 6 continued)

> protection of the laws. I do not think it will take more than a moment to pass that bill.
>
> Mr. Hamilton. I desire that this bill be read.
>
> * * *
>
> Mr. Pomeroy. I have not examined this bill, [S. 365] and I desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?
>
> Mr. Stewart. No; it gives all the protection of laws. If the Senator will examine this bill in connection with the original civil rights bill [the 1866 Act], he will see that it has no reference to inheriting or holding real estate.
>
> Mr. Pomeroy. That is what I was coming to.
>
> Mr. Stewart. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section. Cong. Globe, 41st Cong., 2d Sess. 1536 (1870).

Senator Stewart's statement that the bill "simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section", Cong. Globe at 1536, demonstrates that he, as the author of the bill, intended that it prohibit discrimination against aliens only where state action was involved. Further, his assertion that the 1866 Civil Rights Act "had several other things applying to citizens" shows his intent that the protection of S. 365 be less extensive than that of § 1 of the 1866 Act. *Id.*

Later, in the same session of Congress, Senator Edmunds introduced S. 810, 41st Cong., 2d Sess. (1870) (hereinafter "S. 810"), which was amended to include S. 365. *Id.* at 3480. Meanwhile, the House of Representatives passed H.R. 1293, 41st Cong., 2d Sess. (1870) (hereinafter "H.R. 1293"), its version of substantially the same legislation. *Id.* at 3561-2. With respect to H.R. 1293, Senator Stewart again expressed his understanding that the proposed legislation as it related to aliens was intended to protect only against state action:

> While [Chinese aliens] are here I say it is our duty to protect them.*** It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist...that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws

> and the same laws that other men are. That is all there is in that provision.
>
> **** The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws. Your treaty says that they shall have the equal protection of the laws. Justice and humanity and common decency require it. Cong. Globe at 3658.

On May 21, 1870, the Senate passed H.R. 1293 including S. 810 as amended by S. 365. *Id.* at 3690. A conference report, issued to reconcile the differences between the Senate and House bills, recommended adoption of the equal protection provisions without substantive change. *Id.* at 3752. In the House of Representatives, the only debate on the equal protection provisions occurred during the debate on the conference report. Representative Bingham, the sponsor of H.R. 1293, a House conferee, and the floor manager of the conference report, discussed what was called a "provision regulating the imposition of taxes upon immigrants by the legislation of the respective States." *Id.* at 3871. He characterized the substance of the provision:

> [T]he *States* shall not hereafter discriminate against the immigrant from China and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland; immigrants being persons within the express words of the fourteenth article of the constitutional amendments, shall... be entitled to the equal protection of the laws, not simply of the State itself, but of the Constitution of the United States as well. *Id.* (emphasis added).

During the Senate debate on the equal protection provisions, Senator Stewart, speaking as a Senate conferee on the report, emphasized that Congress could not allow "a State in this Union to pass barbarous and cruel laws, to place upon [Chinese immigrants] unjust and cruel burdens, to tax them differently from other people and collect that tax in a brutal manner." Cong. Globe at 3807-8. He then cited various discriminatory measures pending in the California legislature and quoted extensively from his earlier remarks regarding Chinese aliens. *Id.*

Senator Stewart then challenged Senator Casserly of California who had criticized the equal protection provisions:

> Dare he say to the good people of California that while the Chinese are here under our laws, and while we have a Constitution which says that no State shall deny to any person within its jurisdiction the equal protection of the laws, Congress ought not to pass a law to give them protection? *Id.* at 3808.

The 1870 Act passed with §§ 1, 2, and 3 of S. 365 evolving into §§ 16, 17 and 18 respectively. The Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 144 (May 31, 1870).

In 1866, Congress authorized a codification of federal statutes. Act of June 27, 1866, ch. 140, 14 Stat. 74, reenacted by Act of May 4, 1870, ch. 72, 16 Stat. 96. Thus, The Civil Rights Act of 1866 and The Voting Rights Act of 1870 were codified in §§ 1977 and 1978 of the Revised Statutes of 1874, which later became, and now are, 42 U.S.C. §§ 1981 and 1982, respectively. As Judge Gee explained in the panel decision:

> The codifiers confronted the overlapping civil rights statutes. The 1870 Act gave 'all persons'

> certain rights; the 1866 Act protected only citizens but gave a broader range of rights. Section 16 appeared to subsume all but the property-rights aspect of § 1, since the language was closely parallel and the class of persons protected was a superset of the class protected by § 1. The Revisers' solution was to carve out the property rights given to citizens only, to put these in § 1978 of the Revised Statutes (now § 1982), and to put part of § 16 of the 1870 Act in § 1977 of the Revised Statutes (now § 1981). Thus, § 1982 is a fragment of § 1 of the 1866 Act, while § 1981 is an amalgam of part of § 1 and most of § 16 of the 1870 Act. (Petitioner's Appendix B at 45a-46a).

The legislative history demonstrates disparate treatment of racial and alienage discrimination. Regardless, whether Congress in 1866 intended to prohibit racial discrimination in the private sector is not relevant to this case. The issue is whether Congress in 1870 intended to proscribe private alienage discrimination. The legislative history demonstrates that Congress did not: because The Voting Rights Act of 1870 was enacted to implement the recently passed Fourteenth Amendment, state action is mandated for alienage discrimination to violate § 1981. While § 1981 must be interpreted differently for different classes of persons, such an interpretation is warranted because the present law is, in Judge Gee's words, an "amalgam" derived from two statutes similar in wording but enacted for different purposes. (Petitioner's Appendix B at 46a).

III. The Fifth Circuit's Decision Did Not Withhold any Right from Bhandari which Congress Intended that He Have.

The intent of Congress in 1870 is clear: The Voting Rights Act was designed to implement the Fourteenth Amendment and to proscribe discrimination by the states. If Congress had intended to protect aliens from discrimination by lending institutions, it could have done so in 1974 with the passage of the Equal Credit Opportunity Act[7] which prohibits discrimination based on race and other categories including national origin, but not alienage.[8] Instead, Congress chose not to do so, and this Court should not extend § 1981 to proscribe private alienage discrimination in contravention of congressional intent. As Judge Gee, writing for the en banc court, stated, if § 1981 protected against private alienage discrimination as well as private racial discrimination in employment, Congress would not have deemed it necessary to enact The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b[9] to

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[7] 15 U.S.C. § 1691 provides in pertinent part:

> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--
>
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age....

[8] It is axiomatic that national origin discrimination does not encompass alienage discrimination. *See, e.g., Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). The district court below found that the "record is also devoid of any indication of any denial of credit based upon a particular nationality or that any particular nationality was considered as a factor in evaluating credit. There was no inquiry on the credit applications into nationality or place of birth." (Petitioner's Appendix D at 86a).

[9] 8 U.S.C. § 1324b provides in pertinent part:

> (a) Prohibition of Discrimination based on national origin or citizenship status

prohibit discrimination in employment on the basis of alienage. (Petitioner's Appendix A at 18a). Instead, Congress endured what the Fifth Circuit described as "heroic exertions" in order to pass § 1324b. *Id.* Had Congress felt that alienage and race deserved identical treatment, it could have easily added "citizenship" to the categories of "race, color, religion, sex [and] national origin" protected by Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Petitioner's Appendix A at 17a). The result of the Fifth Circuit's decision is therefore correct in its refusal to extend § 1981 beyond the boundaries intended by Congress.

IV. The *Runyon* Debate is Irrelevant to this Case.

To resolve the question raised by Bhandari's petition, it is unnecessary to join the *Runyon* debate over whether § 1981 prohibits *racial* discrimination in the making of private contracts, an issue which is currently before this Court in *Patterson v. McLean Credit Union*, 56 U.S.L.W. 3735 (U.S. Apr. 25, 1988 (No. 87-107)). The *Runyon* debate is distinguished from the question presented in Bhandari's petition by the historical difference between § 1 of The Civil Rights Act of 1866 and § 16 of The Voting Rights Act of 1870. The difference is ultimately answered

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(Footnote 9 continued)

(1) General rule

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment–
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen..., because of such individual's citizenship status.

by the legislative intent. That is the heart of the distinction, explaining fully (1) why this Court ordered reargument in *Patterson* and (2) why this Court should deny Bhandari's petition. In the *Runyon* debate over § 1, both sides can marshal volumes of historical evidence to support their positions on legislative intent. As revealed by the presentations of the majority and dissenting opinions in *Runyon* and *Jones*, for every Senator or Congressman the majority can quote on the subject of civil rights, the dissent can counter with another Senator or Congressman speaking to state action. Such is not the case regarding § 16 and the protection of aliens. There is no debate. The evidence is one-sided. Section 16 requires state action.

The distinction between § 1 of the 1866 Act and § 16 of the 1870 Act reflects the election by Congress, 118 years ago, to treat the subjects of race and alienage differently, and since then, its refusal to treat them alike. In the final analysis, there is a difference between (1) race, color, religion, sex and national origin and (2) citizenship. The former deal with human characteristics and beliefs, the latter with national allegiance. As Judge Gee states so eloquently:

> Racial and citizenship distinctions are things of a different kind. The former is, for the individual, immutable; the latter is not. The former our polity and increasingly our society as well are resolved, and rightly resolved, to have done with, root and branch, as representing an evil, always and everywhere. The latter is not so readily and roundly condemned: when all is said and done, patriotism remains a civic virtue; and one whose allegiance is bound to another nation may not be suited for certain callings in ours, as the Supreme Court itself has recognized. And while the alien guest is not without his own special claims upon us, arising from our moral tradition, they are of a

different quality from those grounded in our common humanity. (Petitioner's Appendix A at 19a-20a) (footnotes omitted).

The 41st and 99th Congresses of the United States chose not to treat race and citizenship identically. There is no reason to complicate this case by involving it in the *Ruyon* debate.

CONCLUSION

Respondent, First National Bank of Commerce, respectfully submits that the Petition for Writ of Certiorari filed by Jeetendra Bhandari should be denied.

Respectfully submitted,

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No. 87-1293

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEETENDRA BHANDARI,

Petitioner,

v.

FIRST NATIONAL BANK OF COMMERCE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION TO VACATE AND REMAND

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PRELIMINARY STATEMENT

The Fifth Circuit's decision below was premised primarily on the en banc majority's belief that Runyon v. McCrary, 427 U.S. 160 (1976), was incorrectly decided. This position was squarely rejected by this Court in Patterson v. McLean Credit Union, No. 87-107 (June 15, 1989).

For this reason, petitioner respectfully moves this Court to grant the instant petition for a writ of certiorari, and to vacate the judgment and remand this case to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Patterson v. McLean Credit Union, No. 87-107 (June 15, 1989).

PROCEDURAL STATUS

The petition for a writ of certiorari in this case was filed on February 1, 1988. See 56 U.S.L.W. 3628 (U.S. Feb. 1, 1988). The question presented was as follows:

> Does 42 U.S.C. § 1981, which bars alienage discrimination and which bars discrimination in the making of private contracts, prohibit alienage discrimination in the making of private contracts?

Cert. Pet. at i; 56 U.S.L.W. 3628 (U.S. Feb. 1, 1988).

Several months after the filing of the petition in this case, this Court restored Patterson v. McLean Credit Union to the calendar for reargument, and

requested the parties to brief and argue the following question:

> Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered?

Patterson v. McLean Credit Union, 56 U.S.L.W. 3735 (U.S. April 25, 1988).

In view of this order in Patterson, no action has been taken by this Court on the petition in this case for nearly fourteen months.

REASONS FOR VACATING AND REMANDING IN LIGHT OF PATTERSON v. McLEAN CREDIT UNION, No. 87-107 (JUNE 15, 1989)

In Patterson v. McLean Credit Union, No. 87-107 (June 15, 1989), this Court reaffirmed it's earlier decision in Runyon v. McCrary, 427 U.S. 160 (1976),

and accordingly reaffirmed that 42 U.S.C. § 1981 bars discrimination in the making of private contracts.

In the instant case, petitioner, a lawful permanent resident, was denied the right to contract with the respondent bank to obtain a credit card. This refusal to contract occurred solely because petitioner was not a citizen. Cert. Pet. App. at 88a. Petitioner alleged that he was discriminated against on grounds of alienage in violation of 42 U.S.C. § 1981.

Rejecting petitioner's claim, the en banc Fifth Circuit held in a 7-6 decision that § 1981 does not bar alienage discrimination in the private sector. Cert. Pet. App. at 1a-25a. Both the majority and dissenting opinions expressed the view that the majority's

decision was premised on Runyon's having been wrongly decided.

Writing for the majority, Judge Gee characterized the reasoning of Runyon as "severely flawed," "faulty," and unable to "stand of its own force." Cert. Pet. App. at 13a, 14a. Based on his different view of § 1981's legislative history, Judge Gee concluded that "it is patent that these words ["make and enforce contracts"] circumscribe state action only." Cert. Pet. App. at 16a.

Judge Reavley, writing for the six dissenters, described the "root and trunk" of the majority's argument as its "conviction that the legislative history of section 1981 as outlined by the Court in Runyon is erroneous." Cert. Pet. App. at 25a. Disagreeing with the majority,

Judge Reavley added: "I take the law from the Supreme Court." Id.

This Court in Patterson has now reaffirmed Runyon and its holding that § 1981's ban applies not just to state action but to the private sector as well. The Fifth Circuit accordingly should take the law from the Supreme Court by reconsidering this case in light of Patterson.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges the Court to grant the petition for a writ of certiorari, and to vacate the judgment and remand this case to the United States Court of Appeals for the Fifth Circuit for further consideration in light of

Patterson v. McLean Credit Union, No. 87-107 (June 15, 1989).

Dated: June 15, 1989.

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